CLERK'S COP

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 549

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 15, 1930

CERTIORARI GRANTED JANUARY 5, 1931

(35,471)

( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No.

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings before U. S. Board of Tax Appeals	1	1
Docket entries, No. 9345	1	1
Docket entries, No. 11678	6	4
Petition, No. 9345	11	7
Answer, No. 9345 (omitted in printing)	16	
Petition, No. 11678	18	10
Answer, No. 11678 (omitted in printing)	24	
Amended petition	26	13
Answer to amended petition	35	19
Findings of fact and opinion	38	20
Motion re findings (omitted in printing)	68	
Notice of settlement (" " ")	70	
Motion for reconsideration (" " ")	78	
Order denying motion for reconsideration (omitted in printing)	75	
Order of redetermination, No. 9345	77	21
Order of redetermination, No. 11678	78	22
Motion re change of name (omitted in printing)	80	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 10, 1930

	Original	Print
Order changing name of proceeding	85	23
Stipulation of venue	86	23
Petition for review	88	24
Notice of petition for review	99	31
Statement of evidence and order approving same (omitted in printing)	100	
Praecipe for transcript of record	172	32
Proceedings in United States circuit court of appeals, second circuit	175	33
Opinion per curiam	175	33
Judgment	176	34
Order amending mandate	178	35
Clerk's certificate (omitted in printing)	180	
Order extending time	181	35
Stipulation as to parts of record to be printed	184	35
Order allowing certiorari		37

[fols. a-1]

BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 9345

NASH-BREYER MOTOR CO., Formerly Troy Motor Sales Company, 1056 Figueroa Street, Los Angeles, Calif.,

vs.

COMMISSIONER OF INTERNAL REVENUE

For Taxpayer: Theo. B. Benson, Esq.
For Commissioner: J. F. Greaney, Esq., E. C. Lake, Esq., Brooks Fullerton, Esq.

DOCKET ENTRIES

1925.

Nov. 23. Petition received and filed.
" 25. Copy of petition served on Solicitor.
" 25. Notification of receipt mailed taxpayer.
Dec. 17. Answer filed by Solicitor.

1926.

Jan. 5. Copy of answer served on taxpayer—assigned to General Calendar.
Dec. 7. Hearing date set 2-7-27.

1927.

Feb. 2. Motion to transfer to Circuit Calendar filed by taxpayer.
" 5. Granted—Both sides notified.
May 11. Hearing date set 6-21-27 Los Angeles, Calif.
" 14. Motion to restore to day calendar filed by tax-
[fol. 2] payer.
May 14. Motion to amend petition and consolidate for hearing with Docket #11678 filed by taxpayer. Amendment tendered.
" 17. Granted. Both sides notified.
" 17. Motion to restore to day calendar, granted. Both sides notified.
" 20. Copy of amended petition served on G. C.
" 31. Answer to amended petition filed by G. C. Copy served 6/6/27.

1927.

June 13. Notice of appearance of B. Benson attorney for taxpayer.

" 13. Notice of withdrawal of Harry Schwartz as counsel for taxpayer, filed.

" 30. Application for order to take deposition—filed by taxpayer.

July 13. Order to take depositions of W. A. Sellman, et al., signed and filed. Both sides notified.

Aug. 22. Depositions of W. A. Sellman, et al., filed. Copy served.

" 23. Copy of deposition served on G. C.

Oct. 31. Application to take depositions on written interrogatories, filed by taxpayer.

Nov. 8. Objections to written interrogatories and cross-interrogatories filed by G. C.

" 9. Motion to withdraw application for order to take depositions filed by taxpayer.

" 10. Order vacating and cancelling order to take depositions, signed and filed. Both sides no-
[fol. 3] tified.

Nov. 9. Order to take depositions of John J. Troy signed and filed. Both sides notified.

1928.

Feb. 17. Hearing date set 3-19-28.

Mar. 8. Application for subpœna (Comm.) filed by taxpayer.

Mar. 8. Subpœna duces tecum issued. Subpœna duces tecum served 3-8-28.

" 19. Hearing had before Mr. Trammell on merits. Submitted. Briefs due in 60 days.

" 23. Transcript of hearing of 3-19-28 filed.

May 16. Motion for a 45 day extension to file brief filed by taxpayer.

" 17. Motion for extension to 7-2-28 to file briefs, filed by G. C. Granted 5-18-28.

" 17. Motion granted to July 1, 1928.

June 23. Motion for extension to Aug. 1, 1928 to file briefs filed by G. C. Granted 6-25-28.

July 31. Proposed findings and brief filed by taxpayer.

Aug. 1. Brief filed by G. C.

Nov. 15. Motion to file supplemental brief filed by G. C. Supplement tendered. Denied 11-16-28.

1928.

Dec. 4. Findings of fact and opinion rendered. Mr. Trammell. Judgment will be entered under Rule 50.

" 10. Motion for redetermination filed by G. C.

" 15. Notice of settlement filed by G. C. Copy served 12-19-28.

" 15. Hearing set Jan. 9, 1929.

[fol. 4]

1929.

Jan. 9. Order granting rehearing on Feb. 6, 1929, but limited to questions of the statute of limitations, entered.

" 9. Motion for reconsideration filed by taxpayer.

" 29. Order placing proceeding on calendar for hearing Jan. 31, 1929, entered.

" 31. Hearing had before Mr. Trammell. Submitted.

Feb. 5. Transcript of hearing of Jan. 31, 1929, filed.

" 7. Order denying motion for modification of decision and opinion and decision to stand as rendered, entered.

Jan. 9. Hearing had before Mr. Trammell on settlement under Rule 50. Motion for rehearing granted and limited to statute of limitations.

Mar. 16. Order of redetermination entered.

June 18. Motion to change name of petitioner to Nash-Breyer Motor Co., etc., filed by taxpayer.

" 20. Order changing title to read "Nash-Breyer Moto Co.," etc., entered.

July 29. Supersedeas bond for $27,258.26 approved and ordered filed.

Aug. 2. Stipulation of venue filed—United States Circuit Court of Appeals (2).

" 2. Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

" 2. Proof of service filed.

[fol. 5]

Sept. 26. Motion for 30 days extension to prepare and deliver evidence—filed by taxpayer.

" 30. Order enlarging time for preparation of evidence and delivery of record papers to 11-1-29, entered.

1929.

Oct. 29. Agreed motion for 30 days extension to complete statement of evidence, filed.
" 31. Order enlarging time to Dec. 2, 1929, for preparation of evidence and delivery of record papers, entered.
Nov. 27. Agreed præcipe filed.
" 27. Agreed statement of evidence lodged.
" 29. Agreed statement of evidence approved and ordered filed.
Dec. 2. Order enlarging time for transmission and delivery of record papers to Dec. 20, 1929, entered.

Now, December 5, 1929, the foregoing docket entries certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 6] BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 11678

NASH-BREYER MOTOR CO., formerly Troy Motor Sales Company, 1056 Figueroa Street, Los Angeles, Calif.,

vs.

COMMISSIONER OF INTERNAL REVENUE

For Taxpayer: Theo. B. Benson, Esq.
For Commissioner: J.F. Greaney, Esq., E. C. Lake, Esq.

DOCKET ENTRIES

1926.

Feb. 6. Petition received and filed.
" 10. Copy of petition served on Solicitor.
" 10. Notification of receipt mailed taxpayer.
Mar. 27. Answer filed by Solicitor.
Apr. 2. Copy of answer served on taxpayer—Assigned to general calendar.
June 19. Withdrawal of Harry Schwartz and substitution of T. B. Benson as counsel filed.

1927.

May 14. Motion to restore to day calendar filed by taxpayer. See 9345.

" 14. Motion to amend petition and consolidate for hearing with Docket #9345 filed by taxpayer.

[fol. 7] Amendment tendered.

May 17. Granted. Both sides notified.

" 17. Motion to restore to day calendar granted. Both sides notified.

" 20. Copy of amended petition served on G. C.

" 31. Answer to amended petition filed by G. C. Copy served 6-6-27.

June 13. Notice appearance T. B. Benson attorney for taxpayer filed. See 9345.

" 30. Application for Order to take Deposition—filed by taxpayer.

July 13. Order to take depositions signed and filed. Both sides notified.

Aug. 22. Depositions of W. A. Sellman, et al., filed. Copy served. See 9345.

" 23. Copy of depositions served on G. C.

Oct. 31. Application to take depositions on written interrogatories filed by taxpayer.

Nov. 8. Objections to written interrogatories and cross interrogatories filed by G. C. See 9345.

" 9. Motion to withdraw application for order to take depositions, filed by taxpayer.

" 9. Order to take depositions of J. J. Troy signed and filed. Both sides notified.

" 10. Order vacating and cancelling order to take depositions signed and filed. Both sides notified.

1928.

Feb. 17. Hearing date set 3-19-28.

Mar. 8. Application for subpœna (Comm.) filed by tax-

[fol. 8] payer. See 9345.

Mar. 8. Subpœna duces tecum issued. Subpœna served.

" 19. Hearing had before Mr. Trammell on merits. Submitted. Briefs due in 60 days.

" 23. Transcript of hearing of 3-19-28, filed.

May 16. Motion for a 45 day etxension to file brief, filed by taxpayer. See 9345.

1928..

May 17. Motion granted to July 1, 1928.

" 17. Motion for extension to 7-2-28 to file briefs filed by G. C. See 9345.

" 18. Motion granted.

June 23. Motion for extension to Aug. 1, 1928, to file briefs, filed by G. C. See 9345.

" 25. Motion granted.

July 31. Proposed findings and brief, filed by taxpayer. See 9345.

Aug. 1. Brief filed by G. C.

Nov. 15. Motion to file supplemental brief filed by G. C., supplement tendered. See 9345.

" 16. Motion denied.

Dec. 4. Findings of fact and opinion rendered. Mr. Trammell. Judgment will be entered under Rule 50.

" 10. Motion for redetermination, filed by G. C. See 9345.

" 15. Notice of settlement filed by G. C. Copy served 12-19-28.

" 15. Hearing set Jan. 9, 1929.

1929.

Jan. 9. Hearing had before Mr. Trammell. Motion for rehearing granted. Limited to statute of limi-

[fol. 9] tations.

Jan. 9. Order granting rehearing Feb. 6, 1929, but limited to the questions of the statute of limitations, entered.

" 9. Motion for reconsideration filed by taxpayer. See 9345.

" 29. Order placing proceeding on calendar for hearing Jan. 31, 1929, entered.

" 31. Hearing had before Mr. Trammell. Submitted.

Feb. 5. Transcript of hearing of Jan. 31, 1929, filed.

" 7. Order denying motion for modification of the decision and opinion, and said decision and opinion to stand as rendered, entered.

Mar. 16. Order of redetermination, entered.

June 18. Motion to change name of petitioner to Nash-Breyer Motor Co., etc., filed by taxpayer. See 9345.

" 20. Order amending title to read "Nash-Breyer Motor Co., etc." entered. See 9345.

1929.

July 29. Supersedeas bond for $27,258.26 approved and ordered filed.

Aug. 2. Stipulation of venue filed. United States Circuit Court of Appeals (2).

" 2. Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

" 2. Proof of service filed.

Sept. 26. Motion for 30 day additional to prepare and de-
[fol. 10] liver record, filed by taxpayer. See 9345.

Sept. 30. Order enlarging time to Nov. 1, 1929, for preparation of evidence and delivery of record papers, entered.

Oct. 29. Agreed motion for extension of 30 days from Nov. 1, 1929, to complete Statement of Evidence, filed.

" 31. Order enlarging time to Dec. 2, 1929, for preparation of evidence and delivery of record papers, entered.

Nov. 27. Agreed præcipe filed. See 9345.

" 27. Agreed statement of evidence lodged. See 9345.

" 29. Agreed statement of evidence approved and ordered filed. See 9345.

Dec. 2. Order enlarging time to Dec. 20, 1929, for filing certified copies of record papers, entered.

Now, December 5, 1929, the foregoing docket entries certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 11] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 9345

[Title omitted]

PETITION—Filed November 23, 1925

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter, bearing symbols IT:E:SM:-

ACM D-24756-60D, dated September 25, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is a California corporation with principal offices in Los Angeles, California.

2. The deficiency letter, a copy of which is attached hereto and marked Exhibit "A", was mailed to the taxpayer on September 25, 1925, and pursuant to instructions contained therein, the taxpayer's appeal to this Board has been perfected within a period of sixty days, as provided by the Revenue Act of 1924.

3. The taxes in question are corporation income and excess profits taxes for the fiscal year ended June 30, 1921; [fol. 12] the amount of the deficiency asserted against the taxpayer is $6,139.88, and the amount in controversy is the full amount of the deficiency.

4. The determination of tax contained in the said deficiency letter is based on the following error:

The Commissioner of Internal Revenue erroneously refused to allow the amount of the excess profits tax to be determined under the provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

5. The facts on which the taxpayer relies as the basis of its appeal are as follows:

The actual amount of invested capital used for the determination of excess profits tax in the said deficiency letter is exceedingly small and disproportionate to that employed by representative corporations engaged in a similar business.

The taxpayer was a party to a contract with the Nash Motor Company under which it was given an exclusive territorial agency for the sale of cars, which contract although highly productive of income, was not included in invested capital by the Commissioner.

Due to a special financial arrangement, the corporation was given an unusually large credit, which enabled it to transact a large volume of business on a small invested capital.

A great proportion of the income received by the taxpayer was derived from commissions received on a brokerage basis.

[fol. 13] The Commissioner of Internal Revenue has recognized the above mentioned abnormalities of income and invested capital for prior years and has granted special relief for said prior years.

The taxpayer in support of its appeal relies on the following proposition of law:

Where the invested capital or income of a taxpayer is abnormal within the meaning of Section 327 of the Revenue Acts of 1918 and 1921, as disclosed by facts as above set forth, the taxpayer is entitled to have its excess profits tax liability allowed under provision of Section 328 of the said acts.

Wherefore the taxpayer respectfully prays that this Board will hear and determine this appeal.

Harry Schwartz, Counsel for Taxpayer, Woodward Building, Washington, D. C.

Duly sworn to by Robert S. Breyer. Jurat omitted in printing.

[fol. 14] EXHIBIT "A"

Copy

Treasury Department, Washington, D. C.

IT:E:SM:ACM:
D-24757-60D

Sept. 25, 1925.

Troy Motor Sales Company, 1056 Figueroa Street, Los Angeles Calif.

SIRS: An audit of your income and profits tax return for the fiscal year ended June 30, 1921, has resulted in the determination of a deficiency in tax of $6,139.88 as shown in Bureau letter dated August 14, 1925.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in

[fols. 15-17] whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:ACM: D-24756-60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully, D. H. Blair, Commissioner, by J. G. Bright, Deputy Commissioner.

Now, December 5, 1929, the foregoing petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 18] Before United States Board of Tax Appeals

Docket No. 11678

[Title omitted]

Petition—Filed February 6, 1926

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter, bearing symbols IT:E:SM:60-D-HWG-C-803, dated December 12, 1925, and as the basis of its appeal sets forth the following:

1. The taxpayer is a Delaware Corporation with principal offices in Los Angeles, California.

2. The deficiency letter, a copy of which is attached hereto, was mailed to the taxpayer on December 12, 1925, and

pursuant to instructions contained therein, the taxpayer's appeal to this Board has been perfected within a period of sixty days, as provided by the Revenue Act of 1924.

3. The taxes in question are corporation income and excess profits taxes for the fiscal year ended June 30, 1920; the amount of the deficiency asserted against the taxpayer [fol. 19] is $7,489.25; the amount in controversy is the full amount of the deficiency.

4. The determination of tax contained in the said deficiency letter is based on the following error:

The Commissioner of Internal Revenue erroneously refused to allow the amount of the excess profits tax to be determined under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

5. The facts upon which the taxpayer relies as the basis of its appeal are as follows:

The actual amount of invested capital used for the determination of excess profits tax in the said deficiency letter is exceedingly small and disproportionate to that employed by representative corporations engaged in a similar business.

The taxpayer was a party to a contract with the Nash Motor Company under which it was given an exclusive territorial agency for the sale of cars, which contract, although highly productive of income, was not included in invested capital by the Commissioner.

Due to a special financial arrangement, the corporation was given an unusually large credit which enabled it to transact a large volume of business on a small invested capital.

A great proportion of the income received by the taxpayer was derived from commissions received on a brokerage basis.

[fol. 20] The Commissioner of Internal Revenue has recognized the above-mentioned abnormalities of income and invested capital for prior years and has granted special relief for said prior years.

6. The taxpayer in support of its appeal relies on the following proposition of law:

Where the invested capital or income of a taxpayer is abnormal within the meaning of Section 327 of the Revenue

Act of 1918, as disclosed by facts above set forth, the taxpayer is entitled to have its excess profits tax liability determined under the provisions of Section 328 of the said Act.

Wherefore the taxpayer respectfully prays that this Board may hear and determine its appeal.

Harry Schwartz, Counsel for Taxpayer, Woodward Building, Washington, D. C.

Duly sworn to by W. A. Sellman. Jurat omitted in printing.

[fol. 21] Copy

Treasury Department, Washington.

Office of Commissioner of Internal Revenue

IT:E:SM:60-D.
HWG-G-803.

December 12, 1925.

Troy Motor Sales Company, 1056 South Figueroa Street, Los Angeles, California.

Sms: An audit has been made of your income and profits tax return for the fiscal year ended June 30, 1920, with the result that a deficiency in tax of $7,489.25 has been disclosed, as shown in the attached statement.

[fols. 22-25] In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM:60-D-HWG-G-803. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully, D. H. Blair, Commissioner, by ——
——, Assistant to the Commissioner.

Inclosures: Statements. Agreement—Form A.

———

[fol. 26] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9345, 11678

[Title omitted]

AMENDED PETITION

I. The above named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notices of deficiencies covering the year ended June 30, 1920, dated December 12, 1925, and bearing symbols IT:E:SM:60D-HEG-C-803, and covering the year ended June 30, 1921, dated September 25, 1925, and bearing symbols IT:E:SM:ACM-D24706-60D, and as the basis of its amended proceeding, alleges as follows:

1. The petitioner is a Delaware corporation with principal offices in Los Angeles, California.

2. The notice of deficiency covering the year 1920, a copy of which is attached to the original petition, and marked Exhibit "A," was mailed to the petitioner December 12, 1925, and the notice of deficiency covering the year 1921, a copy of which is attached to the original petition and marked [fol. 27] Exhibit "B," was mailed to the petitioner September 25, 1925.

3. The taxes in controversy are corporation, income and profits taxes for the fiscal years ended June 30, 1920, and June 30, 1921, and the amount in controversy is $53,975.58.

4. The determination of tax as set forth in the said notices of deficiences is based upon the following errors:

(a) For each of the years in question, the Commissioner of Internal Revenue erroneously reduced the deduction for officers' salaries paid or incurred.

(b) For each of the years in question, the Commissioner of Internal Revenue erroneously refused to compute the profits tax liability under the provisions of Section 328 of the Revenue Acts of 1918 and 1921.

(c) In addition to the erroneous determinations of tax as above assigned, the Commissioner of Internal Revenue is, for each of the years in question, attempting to collect taxes heretofore assessed but not collected, the collection of which said taxes is now barred by the Statute of Limitations.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

[fol. 28] (a) During each of the years in question the Commissioner of Internal Revenue reduced the salary of John J. Troy from $15,000.00 to $12,000.00, and that of H. J. Coger from $15,000.00 to $12,000.00. The said Troy and the said Coger were officers of the petitioner and were actively employed and devoted all their time to it during the years in question, and the salaries of each of the officers in the full sum of $15,000.00 were paid or incurred, and the said amounts represent reasonable compensations for services rendered within the meaning of Section 234(a) (1) of the Revenue Acts of 1918 and 1921.

(b) During each of the years in question the invested capital of the petitioner was abnormally low and abnormally low salaries were paid to officers.

For the year ended June 30, 1920, the net income, invested capital, and excess profits tax liability, as disclosed in the notice of deficiency, amounted to $300,447.41, $139,921.91 and $111,743.34, respectively. The net income is about 215% of the invested capital. The profits tax is about 37% of the net income and about 80% of the invested capital.

For the year ended June 30, 1921, the net income, invested cap-tal and profits tax liability, as shown in the 30 day letter

referred to in the notice of deficiency are $124,010.39, $234,196.67 and $35,889.14, respectively.

The abnormally low invested capital for each of the years in question is due to the fact that during these years the [fol. 29] petitioner was operating under a territorial contract with the Nash Motor Car Company, covering Southern California and Arizona and that due to a special arrangement with the Nash Motor Car Company, the petitioner was given unusual credit and was also given a preference in the shipment of cars, by reason of which the petitioner was able to operate largely on borrowed capital paid in (in advance of shipment of cars) by sub-agents and customers and on borrowed capital received from creditors, all of which borrowed capital the petitioner was able to operate on because of the fact that it was able to get shipments of cars and unusual credit arrangements, cars being in great demand and the petitioner's sub-agents and customers knowing that the petitioner, under its preferred arrangement with the Nash Motor Company, could procure cars where other agents could not. Sub-agents and customers deposited with the petitioner large sums of money in advance of the shipments of cars by reason of which the petitioner was able to operate largely on borrowed capital.

John J. Troy and H. J. Coger were President, General Manager, and Treasurer and owners of all of the capital stock. They devoted all of their time and efforts to the business, for which they were compensated in the amounts set forth above.

The profits tax liability for the years ended June 30, 1918, and June 30, 1919, was by the Commissioner of Internal Revenue determined under the provisions of Section 210 of the Revenue Act of 1917 and Section 328 of the Revenue [fol. 30] Act of 1918, as evidenced by the said Commissioner's letter dated July 14, 1923, a copy of which is attached hereto and made a part hereof and marked Exhibit "C."

(c) The total income and profits tax as stated in the petitioner's return was for the year ended June 30, 1920, in the amount of $122,924.50, which said amount was duly assessed on the September, 1920, list, account number 402411. The last quarterly installment of the tax in the sum of $30,731.11 has never been paid; no suit or other proceeding for

the collection of the tax has been begun; and no valid agreement has been entered into between the petitioner and the Commissioner of Internal Revenue, under which the unpaid balance can be collected after the expiration of the time allowed by law therefor.

For the year ended June 30, 1921, the petitioner duly filed its income and profits tax return within the time prescribed by law, which said return disclosed a total tax liability in the amount of $88,461.39, which said sum was assessed on the September, 1921, list, Account No. 402186. The last quarterly payment in the sum of $9,615.34, has not been as yet paid; no suit or other proceeding has been begun for its collection, and the petitioner and the Commissioner of Internal Revenue have entered into no valid agreement by which the running of the Statute of Limitations against the collection of the amount, has been waived.

[fol. 31] Wherefore the petitioner prays that this Board may hear the proceeding and determine that the full amount of salaries paid or incurred in the sum of $30,000.00, for each of the years in question, should be allowed as deductions; that the profits tax liability for each of the years in question be determined under Section 328 of the Revenue Acts of 1918 and 1921, and that pursuant to the authority contained in Section 906 (e) of the Revenue Act of 1926, that this Board determine that the outstanding assessments in the said sums of $30,731.11 and $9,615.34 cannot now be collected because barred by the Statute of Limitations, and that this Board grant such other and further relief as the premises justify.

Respectfully submitted.

Theodore B. Benson, 917 Southern Building, Washington, D. C., Counsel for Petitioner. J. Arthur Greenfield, 737 Citizens National Bank Bldg., Los Angeles, California.

Duly sworn to by W. A. Sellman. Jurat omitted in printing.

[fol. 32] EXHIBIT "C"

July 14, 1923.

Troy Motor Sales Company, 1056 South Figueroa St., Los Angeles, Calif.

SIRS: Reference is made to your income and profits tax returns for the fiscal periods ended December 31st, 1917, June 30, 1918, and June 30, 1919. The taxes for these periods have previously been determined as set forth in office letter of October 28, 1921, with the result that no excess [fol. 33] profits tax was assessed for the period ended December 31, 1917, and that the profits taxes for the fiscal periods ended June 30, 1918, and June 30, 1919, were determined under Section 328 of the Revenue Act of 1918.

From this determination of the tax you appealed to the Committee on Appeals and Review, particular exception being taken to the method of handling profits from "Lease Contracts" and also to the comparatives used in assessing the profits tax under Section 328. The Committee has carefully considered your case and sustained the action of the Unit in determining profits from lease contracts, advising however that certain comparatives used in computing the tax under Section 328 should be eliminated. Accordingly, the tax under Section 328 has been recomputed, the revised computation of the tax being shown below:

The tax for the year 1917 as shown in letter of October 28, 1921, is affirmed as previously assessed.

Computation of Tax—6 Months Ended June 30, 1918

Profits tax, Section 328			$10,618.83
Net income		$31,353.32	
Less:			
Profits tax	$10,618.83		
Exception	2,000.00		
		12,618.83	
Amount taxable at 12%		18,734.49	2,248.14
Total Tax assessable			12,866.97

[fol. 34]

Original assessment	1,385.87

3—38

No. 400,221, Additional assessment, December, 1921, Page 37, Line 9		13,923.58
Total assessment		15,309.45
Tax Liability		12,866.97
Overassessment		$2,442.48

Computation of Tax—Year Ended June 30, 1919

Profits tax, Section 328:		
1918 rates, 6 months		$16,133.21
1919 rates, 6 months		12,552.60
Total profits Tax		28,665.81
Net income	$93,599.74	
Less:		
Profits Tax	$28,665.81	
Exemption	2,000.00	
	30,665.81	
Amount taxable at 12%, 6 months	$62,933.93	3,776.04
Amount taxable at 10%, 6 months	62,933.93	3,146.70
Total tax assessable		$35,588.55
Original assessment (tentative return)		12,000.00
Additional assessment, Form 1120, No. 40080		32,171.31
Total		$44,171.31
[fol. 35] Less overassessment, October 14, 1921		4,071.34
Total assessment		$40,099.97
Tax Liability		35,588.55
Overassessment		$4,511.42

Respectfully, J. G. Bright, Deputy Commissioner.

Now, December 5, 1929, the foregoing amended petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9345 and 11678

[Title omitted]

ANSWER TO AMENDED PETITION—Filed May 31, 1927

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, [fol. 36] for answer to the amended petition of the above-named taxpayer, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Alleges that the taxes in controversy are in the amount of $7,489.25 for the fiscal year ending June 30, 1920, and in the amount of $6,139.88 for the fiscal year ending June 30, 1921.

5 (a). Admits that John J. Troy and H. J. Coger were officers of the petitioner and that their alleged salaries were reduced to $12,000, respectively.

5 (b). Admits that the Commissioner found for the year ended June 30, 1920, the net income, invested capital and excess profits tax liability of the petitioner to be $300,447.41, $139,921.91 and $111,743.34, respectively and for the year ended 1921, in the amounts of $124,010.30, $234,196.67 and $35,889.14, respectively. Admits that the Commissioner determined for the years ended June 30, 1918, and June 30, 1919, the tax liability of the petitioner as set forth in his letter to the taxpayer dated July 14, 1923.

5 (c). Admits that the petitioner filed its income tax returns for the year ending June 30, 1920, and June 30, [fol. 37] 1921, showing taxes due in the amounts of $122,924.50 and $38,461.39, respectively and that balances due on said taxes have not been paid.

Denies generally and specifically each and every allegation of fact contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the Commissioner's recommendation be approved and that the petition be dismissed and the appeal denied.

A. W. Gregg, General Counsel, Bureau of Internal Revenue. Of Counsel: Arthur H. Fast, Special Attorney, Bureau of Internal Revenue.

AHF:JJG:fem.

Now, December 5, 1929, the foregoing answer to amended petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fols. 38-40] Before United States Board of Tax Appeals

Docket Nos. 9345 and 11678

Troy Motor Sales Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Promulgated December 4, 1928

Findings of Fact and Opinion

* * * * * *

[fols. 41-47] Findings of Fact

The petitioner, a Delaware corporation, with its principal office at Los Angeles, California, was organized in April, 1917, by John J. Troy, H. J. Coger and David H. Howie, to engage in the business of buying and selling automobiles and accessories in Southern California and in the State of Arizona. During the years involved in this proceeding, the petitioner was engaged in distributing Nash and Lafayette automobiles and accessories in the above mentioned territory.

* * * * * * *

[fols. 48-76] On September 15, 1920, the petitioner filed with the Collector of Internal Revenue for its district its

income and profits-tax return for the fiscal year ended June 30, 1920, and reported thereon a tax of $122,924.50, which amount was entered by the Collector on the September, 1920, list and appears on an assessment certificate signed by the Commissioner of Internal Revenue on November 8, 1920. The petitioner filed its return for the fiscal year ended June 30, 1921, on September 15, 1921, and reported thereon a tax of $38,461.39, which amount was entered by the Collector on the September, 1921, list and appears on an assessment certificate signed by the Commissioner on November 10, 1921.

* * * * * * * * *

[fol. 77] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 9345

TROY MOTOR SALES COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER OF REDETERMINATION

Pursuant to the Findings of Fact and Opinion of the Board promulgated December 4, 1928, the respondent in the above entitled proceeding filed a computation and notice with the Board on December 10, 1928, and an additional computation and notice on December 15, 1928. Copy of said notices were duly served on the petitioner together with notice of hearing. The case having been called for hearing on January 9, 1929, and further hearing being had thereon on January 31, 1929, the Board being fully advised in the premises, it is,

Ordered and decided upon redetermination that for the year ended June 30, 1921, there is a deficiency of $6,139.88 and in addition thereto an unpaid tax liability of $9,432.97.

(Signed) Charles M. Trammel, Member United States Board of Tax Appeals.

[fol. 78] Entered March 16, 1929.

Now, December 5, 1929, the foregoing order certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

A true copy. Teste: B. D. Gamble, Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals, Washington

Docket No. 11678

Troy Motor Sales Company, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Order of Redetermination

Pursuant to the Findings of Fact and Opinion of the Board promulgated December 4, 1928, the respondent in [fols. 79-84] the above entitled proceeding filed a computation and notice with the Board on December 10, 1928, and an additional computation and notice on December 15, 1928. Copy of said notices were duly served on the petitioner together with notice of hearing. The case having been called for hearing on January 9, 1929, and further hearing being had thereon on January 31, 1929, the Board being fully advised in the premises, it is

Ordered and decided upon redetermination that for the year ended June 30, 1920, there is a deficiency of $7,489.25 and in addition thereto an unpaid tax liability of $30,731.11.

(Signed) Charles M. Trammell, Member United States Board of Tax Appeals.

Entered March 16, 1929.

Now, December 5, 1929, the foregoing order certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

A true copy. Teste: B. D. Gamble, Clerk U. S. Board of Tax Appeals.

[fol. 85] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 9345; 11678

[Title omitted]

ORDER CHANGING NAME OF PROCEEDING—June 20, 1929

On motion of counsel for petitioner, and certified copy of certificate of amendment filed in the above proceeding, it is

Ordered that the name and style of this proceeding be and hereby is changed to read "Nash-Breyer Motor Co., formerly Troy Motor Sales Company."

(Signed) Benjamin H. Littleton, Member U. S. Board of Tax Appeals.

Dated Washington, D. C., June 20, 1929.

Now, December 5, 1929, the foregoing order certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 86] BEFORE UNITED STATES BOARD OF TAX APPEALS

B. T. A. Docket Nos. 9345 and 11678. No. Term, 192.

[Title omitted]

STIPULATION OF VENUE—Filed Aug. 2, 1929

It is hereby agreed and stipulated by and between the parties in the above entitled cause, by their respective attorneys, that the decision and orders of the United States Board of Tax Appeals in the said cause, dated the 16th of March, 1929, redetermining the amount of income and profits taxes of the said Troy Motor Sales Company for the fiscal years ending June 30, 1920 and June 30, 1921, may be reviewed by the United States Circuit Court of Appeals for the Second Circuit.

[fol. 87] This agreement is made under and pursuant to the provisions of Section 1002 of the Revenue Act of 1926.

Theodore B. Benson, Attorney for Petitioner. C. M. Charest, Attorney for Commissioner of Internal Revenue.

Dated this 17th day of July, 1929.

Now, December 5, 1929, the foregoing stipulation of venue certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 88] In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket Nos. 9345 and 11678. No. Term, 192.

Nash-Breyer Motor Co., Formerly Troy Motor Sales Company, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Petition for Review—Filed Aug. 2, 1929

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioner, Nash-Breyer Motor Co., formerly Troy Motor Sales Company, is aggrieved by the decisions of the United States Board of Tax Appeals rendered on March 16, 1929, in the cases of Troy Motor Sales Company v. Commissioner of Internal Revenue, Nos. 9345 and 11678 on the docket of the said Board of Tax Appeals, the name and style of the causes having been changed to Nash-Breyer Motor Co., formerly Troy Motor Sales Company, and respectfully submits its petition for review thereof by the United States Circuit Court of Appeals for the Second [fol. 89] Circuit, the parties having agreed that the review shall be in this Court, as evidenced by a stipulation filed with the Clerk of the said Board.

I

Statement of the Case

1. On November 23, 1925, the petitioner filed with the United States Board of Tax Appeals, pursuant to the provisions of Section 274 of the Revenue Act of 1924, its petition for the redetermination of an alleged deficiency in income and profits taxes for the fiscal year ended June 30, 1921, in the amount of $6,139.88, as shown by a notice of deficiency previously mailed to the petitioner by the respondent under date of September 25, 1925. The allegations of the said petition insofar as material to the present proceedings are in substance as follows:

That the petitioner is a Delaware corporation having the principal place of business at Los Angeles, California; that the respondent on September 25, 1925, mailed to the petitioner a notice of deficiency showing a deficiency in income and profits taxes for the fiscal year 1921, in the amount of $6,139.88; that the income and capital of the petitioner were affected by abnormal conditions and that the profits tax should be determined under the provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

2. Thereafter and on December 17, 1925, the respondent filed with the said Board his answer to the said petition, [fol. 90] which answer admitted that the petitioner is a Delaware corporation and that it maintained its principal office at Los Angeles, California; that the respondent on September 25, 1925, mailed to the petitioner a notice of deficiency showing a deficiency in the said amount of $6,139.88; and that the respondent had refused to determine the profits tax under the provisions of Sections 327 and 328, but denied that this was error.

3. On February 6, 1926, the petitioner likewise filed with the said Board of Tax Appeals its petition for the redetermination of an alleged deficiency in income and profits taxes for the fiscal year ended June 30, 1920, in the amount of $7,489.25, as shown by a notice of deficiency previously mailed to the petitioner by the respondent under date of

December 12, 1925. The allegations of the said petition insofar as material to the present proceedings are in substance as follows:

That the petitioner is a Delaware corporation having its principal place of business at Los Angeles, California; that the respondent on December 12, 1925, mailed to the petitioner a notice of deficiency showing a deficiency in income and profits taxes for the fiscal year 1920, in the amount of $7,489.25; that the income and capital of the petitioner were affected by abnormal conditions and that the profits tax should be determined under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

4. Thereafter and on March 27, 1926, the respondent filed [fol. 91] with the said Board his answer to the petition and admitted that the petitioner is a corporation organized and existing as alleged and that it maintained its principal office at Los Angeles, California; that the respondent on December 12, 1925, mailed to the petitioner a notice of deficiency showing a deficiency in income and profits taxes in the amount of $7,489.25; and that the respondent had refused to determine the profits tax under the provisions of Sections 327 and 328, but denied that this was error.

5. On May 14, 1927, the petition filed with the said Board a motion for leave to consolidate and amend its petitions theretofore filed, which motion was by the said Board granted on May 17, 1927, and an amended petition was on that date filed. The allegations of the said amended petition insofar as material to the present proceedings are in substance as follows:

That the petitioner is a corporation as alleged and that the said notices of deficiency were mailed as alleged in the original petitions; that during each of the years in question there was credited on the books of the petitioner as salaries duly authorized the sum of $15,000.00 to each of the two officers; that the respondent in determining the deduction for compensation for services under the provisions of Section 234 (a) (1) of the Revenue Acts of 1918 and 1921, erroneously reduced the amount thereof to $12,000.00 to each of the said officers; that during each of the said years the capital and income of the petitioner were affected by abnormal conditions within the meaning of Section 327 of

the Revenue Acts of 1918 and 1921 and that the profits tax [fol. 92] should be determined in the manner provided in Section 328 of the said Acts; that the petitioner on September 15, 1920 filed its return of income and profits taxes for the fiscal year 1920 and reported therein as such taxes the sum of $122,924.50 and on September 15, 1921 filed its return for the fiscal year 1921 and reported therein as such taxes the sum of $38,461.39; and that the last quarterly installment of tax for the year 1920 in the amount of $30,731.11 and the last quarterly installment for the year 1921, in the amount of $9,615.33 have not been collected; and that the time within which the respondent could legally collect the said sums had expired.

6. Thereafter and on May 31, 1927, the respondent filed with the said Board his answer to the said consolidated and amended petition which answer alleged that the tax in controversy for the year June 30, 1920, was $7,489.25 and for the year June 30, 1921, $6,139.88; admitted that the respondent reduced the salaries of the two officers to $12,000.00 each; that the respondent refused to determine the profits tax liability under the provisions of the said Sections 327 and 328 and that there was reported in the return for the year ended June 30, 1921, the sum of $38.461.39; and denied all allegations of fact not specifically admitted.

7. The causes being at issue under the rules of practice of the said Board on the filing of the said answer to the said amended petition, duly came on for hearing March 19, 1928, at which time the petitioner by competent witness of-[fol. 93] fered testimony in support of the allegations of its amended petition as aforesaid and the cause was argued and submitted.

8. Thereafter and on December 4, 1928, the Board rendered its findings of fact and opinion in the cause. The said Board found that the salaries credited to each of the said officers in the amount of $15,000.00 were not paid or incurred; that neither the capital nor income was affected by abnormal conditions and that the statute of limitations had not run against the right of the respondent to collect the unpaid balance of the tax reported in the return for the year 1920 in the amount of $30,731.11 and reported in the return for the year June 30, 1921 in the amount of $9,432.97,

9. On January 9, 1929, the petitioner moved the Board to reconsider its opinion and pursuant to an order of the Board entered on the same day the motion came on for hearing January 31, 1929, and the Board by order dated February 7, 1929, denied the petitioners motion for reconsideration.

10. On March 16, 1929, the said Board entered a final order of redetermination for each of the years under consideration redetermining a deficiency for the year 1920 in the amount of $7,489.25, and stating, in addition thereto, an unpaid tax liability of $30,731.11, and for the year 1921 redetermining a deficiency in the amount of $6,139.88, and stating, in addition thereto an unpaid tax liability in the amount of $9,432.97.

[fol. 94] 11. On June 18, 1929, the petitioner by motion sugested to the Board that on March 8, 1928, its charter was amended and its name changed from Troy Motor Sales Company to Nash-Breyer Motor Co., and prayed that the name and style of Docket Nos. 9345 and 11678 be changed to Nash-Breyer Motor Co., formerly Troy Motor Sales Company, which said motion was granted by the Board June 20, 1929.

II

Assignments of Error

Your petitioner believes and avers that errors were committed by the Board, to its damage and prejudice, as shown by the following:

1. The Board erred in entering judgment for the respondent on each of the issues raised on the amended petition.

2. The Board erred in redetermining the deficiencies as found by the respondent.

3. The Board erred in holding that the amounts of certain salaries properly credited to officers on the books of the petitioner were neither paid nor incurred and were not deductible from income.

4. The holding of the Board that the said salaries so credited to the officers of the petitioner were not deductible

from income is contrary to the evidence and is without evidence to support it.

[fol. 95] 5. The Board erred in refusing to hold in accordance with the evidence that the said salaries were properly credited to the said officers in the manner defined in Section 300 of the Revenue Acts of 1918 and 1921.

6. The Board erred in holding that neither the capital nor the income of the petitioner was affected by abnormal conditions within the meaning of Section 327 of the Revenue Acts of 1918 and 1921.

7. The holding of the Board that neither the capital nor the income of the petitioner was affected by abnormal conditions is unsupported by and is contrary to the evidence.

8. The Board erred in refusing to hold in accordance with the evidence that the capital of the petitioner was affected by abnormal conditions within the meaning of the said Section 327.

9. The Board erred in refusing to hold in accordance with evidence that the income of the petitioner was affected by abnormal conditions within the meaning of said Section 327.

10. The Board erred in excluding from evidence a document offered in evidence as petitioners Exhibit No. 7, entitled "A Certificate of Overassessment" covering the year ended June 30, 1919, and showing that the respondent found that for the first six months of the calendar year 1919 the capital and income of the petitioner were affected by abnormal conditions, which said six months fell within [fol. 96] the same calendar year as the first six months of the petitioner's fiscal year ended June 30, 1920.

11. The Board erred in holding that it has jurisdiction to determine that the statute of limitations has not run against the right of the respondent to collect assessments, made during the years 1920 and 1921, of amounts reported on the original returns filed by the petitioner, which said amounts were not deficiencies as defined by Section 273 of the Revenue Acts of 1924 or 1926.

12. The Board erred in holding that the provisions of Section 278 (d) of the Revenue Acts of 1924 and 1926 pro-

vided the time within which the tax assessed on the original returns filed by the petitioner may be collected.

13. The Board erred in refusing to hold that the time within which the tax assessed on the original returns and during the years 1920 and 1921, can be collected is the five-year period as defined in Section 250 (d) of the Revenue Act of 1921.

14. The Board erred in holding that the running of the statute of limitations against the right of the respondent to collect the assessment made on the original returns was revived by the filing of the petitions with the said Board.

15. The Board erred in holding that the running of the statute of limitations against the right of the respondent to [fol. 97] collect the assessments made on the returns was suspended by the filing of the petitions.

16. The Board erred in admitting in evidence over the objections of the petitioner certain documents entitled "Income and Profits Tax Waiver" and bearing date of December 21, 1927, and offered in evidence as respondent's Exhibit "L" and "M", which said documents were delivered to the Collector of Internal Revenue on December 23, 1927, on which said date the petitioner wrote a letter to the said Collector qualifying the said documents, which said letter was delivered to and was in the possession of the said Collector before the said documents were accepted or signed by the Commissioner of Internal Revenue or anyone on his behalf.

17. The Board erred in refusing to admit in evidence the said letter dated December 23, 1927, offered by the petitioner as Exhibit "25."

18. The Board erred in admitting in evidence over the objection of the petitioner a document entitled "Income and Profits Tax Waiver" dated December 16, 1926, which said document was not signed by either of the parties named in the body thereof.

19. The Board erred in entering its orders of redetermination in that the same are indefinite and meaningless and do not conform to the opinion promulgated and the petitioner is not appraised of its rights and liabilities thereunder.

[fol. 98] 20. In its orders of redetermination the said Board erred in ordering and deciding that for the year June 30, 1920, there is an unpaid tax liability of $30,731.11 and for the year June 30, 1921, an unpaid tax liability of $9,432.97. In entering its orders of redetermination the Board exceeded the jurisdiction conferred upon it by the Revenue Act of 1926 to redetermine a deficiency.

21. Having assumed jurisdiction the Board erred in refusing to hold that the statute of limitations had run against the rights of the respondent to collect the amounts of assessments made during the years 1920 and 1921.

Wherefore your petitioner prays that the decisions of the Board of Tax Appeals entered herein against it be reviewed by this Honorable Court and for such other and further relief as the Court may deem meet and proper in the premises.

Nash-Breyer Motor Company, Formerly Troy Motor Sales Company, by (Sgd.) Theodore B. Benson, Attorney.

City of Washington,
District of Columbia, ss:

Theodore B. Benson, being duly sworn deposes and says that he is attorney for petitioner, that he knows the contents of the foregoing petition, that to the best of his knowl-[fol. 99] edge and belief the statements therein are true, and that the assignments of error are well taken and intended to be argued.

(Sgd.) Theodore B. Benson.

Subscribed and sworn to before me this 29th day of July, 1929.

Beryl W. Roberts, Notary Public, D. C.

Before United States Board of Tax Appeals

Notice of Petition for Review—Filed Aug. 2, 1929

To General Counsel, Bureau of Internal Revenue, Attorney for Respondent:

You are hereby notified that on the 21 day of August, 1929, a petition for review of the decisions of the United

States Board of Tax Appeals was filed with the Clerk of the Board in the case of Nash-Breyer Motor Co., Formerly Troy Motor Sales Company, vs. the Commissioner of Internal Revenue, Docket Nos. 9345 and 11678 and a true copy of said petition is herewith served upon you.

Theodore B. Benson, Attorney for Petitioner.

[fols. 100-171] Receipt of the above petition acknowledged this 2d day of August, 1929.

C. M. Charest, General Counsel, Bureau of Int. Rev., Attorney for Respondent.

Now, December 5, 1929, the foregoing petition for review, notice of filing and proof of service certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 172] Before United States Board of Tax Appeals

B. T. A. Docket Nos. 9345 and 11678. No. —

[Title omitted]

Præcipe for Transcript of Record—Filed Nov. 27, 1929

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days and such additional time as has been granted by the Board, from the date of the filing of the petition for review in the above-stated case, transmit to the clerk of the United States Circuit Court of Appeals for the Second Circuit, certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the above entitled cause.

2. Pleadings before the Board: Petitions and Answers and Amended Petition and Amended Answer.

[fol. 173] 3. Findings of fact, opinion, decision of the Board.

4. Motion for Reconsideration, Board Orders dated January 9, 1929 and February 7, 1929.

5. Motion filed December 10, 1928, by respondent and Notice of Settlement and computation attached thereto dated December 15, 1928.

6. Two (2) Board Orders of Redetermination dated March 16, 1929.

7. Motion with Certificate of Amendment attached filed June 18, 1929, and Board Order dated June 20, 1929, changing name and style of proceeding.

8. Stipulation for Review by the United States Circuit Court of Appeals for the Second Circuit.

9. Petition for Review.

10. Statement of Evidence settled or agreed upon.

11. This præcipe.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Court [fol. 174] of Appeals for the Second Circuit.

Theodore B. Benson, Attorney for Petitioner on Review. C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Now, December 5, 1929, the foregoing præcipe certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 175] In United States Circuit Court of Appeals for the Second District, October Term, 1929

No. 251

Argued May 12. 1930. Decided June 9, 1930

Nash-Breyer Motor Co., Formerly Troy Motor Sales Co., Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Appeal from the United States Board of Tax Appeals

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Petition to review a decision of the Board of Tax Appeals fixing the petitioner's income and profits tax for the years ending June 30, 1920 and 1921.

Arthur H. Deibert, of Washington, D. C., for petitioner.

John Vaughan Groner, of Washington, D. C., for respondent.

OPINION

PER CURIAM:

This petition must be dismissed for lack of jurisdiction for the reasons given in Massachusetts Fire & Marine Insurance Co. v. Commissioner, 40 F. (2d) —, handed down herewith. The facts are the same, except that the petitioner is a Delaware corporation, which filed its return in California. The case is a more striking illustration of the possible consequences. We should have to find very solid reasons for supposing that Congress intended to impose upon us at the will of the parties a controversy which for obvious reasons properly belongs either in the Ninth circuit, or in the District of Columbia. We can repeat here as well, however, that in fact the petitioner has suffered nothing from dismissal.

Petition dismissed for lack of jurisdiction.

[fol. 176] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

NASH-BEZYER MOTOR CO., Formerly Troy Motor Sales Co., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

JUDGMENT—Filed June 16, 1930

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the appeal from said United States Board of Tax Appeals be, and it hereby is, dismissed for lack of jurisdiction.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 177] [File endorsement omitted.]

[fol. 178] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Order Amending Mandate—Filed July 16, 1930

Upon application of counsel for the Petitioner it is

Ordered that the mandate of this court heretofore issued herein be and hereby is recalled and amended by adding the words to the ordering clause in said mandate "but without prejudice to any further proceedings before the Board of Tax Appeals to bring the review before the proper United States Circuit Court of Appeals".

Wm. Parkin, Clerk.

[fol. 179] [File endorsement omitted.]

[fol. 180] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 181 & 182] In Supreme Court of the United States

Order Extending Time Within Which to Apply for Writ of Certiorari—Filed Sept. 12, 1930

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is now here ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of 60 days from September 16, 1930.

Charles E. Hughes, Chief Justice of the United States.

Dated this 12th day of September, 1930.

[fol. 183] [File endorsement omitted.]

[fol. 184] In Supreme Court of the United States

Stipulation as to Parts of Record to be Printed—Filed Nov. 8, 1930

Counsel for petitioner and respondent hereby stipulate and agree that the following parts only of the record in

the Circuit Court of Appeals for the Second Circuit, shall be printed as the record in this Court on application for writ of certiorari:

1. Docket entries, No. 9345, pages 1-5.
2. Docket entries, No. 11678, pages 6-10.
3. Petition, No. 9345, pages 11-15.
4. Petition, No. 11678, pages 18-22.
5. Amended Petition, page 26 to middle of page 35.
6. Answer to Amended Petition, middle of page 35 to middle of page 37.
7. Findings of Fact Board of Tax Appeals, page 41, lines 5 to 14 inclusive and page 48, lines 8 to 22 inclusive.
8. Order of Redetermination, No. 9345, page 77 to middle of page 78.
9. Order of Redetermination, No. 11678, middle of page [fol. 185] 78 to bottom of page 79.
10. Order entered June 20, 1929, page 85.
11. Stipulation of Venue, pages 86-87.
12. Petition for Review, pages 88-99.
13. Notice of Service, middle of page 99 to middle of page 100.
14. Præcipe, pages 172 to 174 inclusive.
15. Decision of United States Circuit Court of Appeals for the Second Circuit, dated June 9, 1930.
16. "Order for Mandate" of the United States Circuit Court of Appeals for the Second Circuit, dated June 16, 1930.
17. "Order" recalling and amending "Order for Mandate" of the United States Circuit Court of Appeals for the Second Circuit, dated July 16, 1930.
18. The Verification of the Record by the Clerk of the United States Circuit Court of Appeals for the Second Circuit.
19. Order extending time within which to apply for writ of certiorari.
20. This Stipulation

Theodore B. Benson. Theodore B. Benson, Counsel for Petitioner. Thomas D. Thacher, Solicitor General of the United States, Counsel for Respondent.

[fol. 186] [File endorsement omitted.]

Supreme Court of the United States

Order Allowing Certiorari—Filed January 5, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
NOV 15 1930
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 549

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THEODORE B. BENSON,
Counsel for Petitioner.

ARTHUR H. DEIBERT,
M. F. MITCHELL,
GEORGE G. WITTER,
Of Counsel.

(35,471)

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	2
Reasons relied on for the allowance of the writ	3
Prayer for writ	4
Brief in support of petition for writ of certiorari	5
I. The opinion of the court below	5
Order extending time for application for writ	6
II. Jurisdiction	6
III. Statement of the case	7
IV. Statutes involved	8
V. Specification of errors	9
VI. Argument	9
Conclusion	11

Table of Cases Cited.

Greylock Mills v. Commissioner of Internal Revenue, 31 F. (2d), 655; certiorari denied, 50 S. Ct., 25	4, 11
Joy Floral Company v. Commissioner of Internal Revenue, 29 F. (2d), 865	4, 11

Table of Statutes Cited.

Section 1001, Revenue Act of 1926, 44 Stat., 109	3, 8
Section 1002, Revenue Act of 1926, 44 Stat., 110	3, 8

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 549

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Theodore B. Benson, on behalf of the Nash-Breyer Motor Company, formerly Troy Motor Sales Company, a body corporate, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above-entitled cause on June 16, 1930, amended July 16, 1930, the time for filing petition for

writ of certiorari having been extended 60 days by order of the Chief Justice entered September 12, 1930.

A.

Summary Statement of the Matter Involved.

The petitioner duly filed its return of income and profits taxes for the fiscal years June 30, 1920 and 1921, with the collector of internal revenue at Los Angeles, California.

On November 23, 1925, the petitioner filed with the Board of Tax Appeals a petition for the redetermination of a deficiency in the amount of $6,139.88 for the year June 30, 1921, and on February 6, 1926, the petitioner filed with the Board a petition for the redetermination of a deficiency, in the amount of $7,489.25 for the year June 30, 1920. Thereafter the petitioner filed an amended petition and the causes were consolidated and came on for hearing before the Board and the issues raised in the amended petition and the amended answer were decided by the Board adversely to the petitioner and the Board on March 16, 1929, entered its orders of redetermination.

On August 2, 1929, there was filed with the Board of Tax Appeals a stipulation of venue in which the parties agreed by their respective attorneys that the decision of the Board might be reviewed by the United States Circuit Court of Appeals for the Second Circuit.

On August 2, 1929, the petitioner filed with the Board its petition for review of the decisions. The petition was for review by the United States Circuit Court

of Appeals for the Second Circuit. On the same day a copy of the petition was served on the respondent.

The cause came on for a hearing before the United States Circuit Court of Appeals for the Second Circuit on May 12, 1930, and on June 9, 1930, that court decided that venue could not be stipulated by the parties and entered an order dismissing the petition.

The provisions of the Revenue Act of 1926 as applicable here are those contained in Sections 1001 and 1002 of the Revenue Act of 1926 (44 Stat. 109, 110). Section 1002 is printed in full in the brief in support of the petition for the writ.

B.

Reasons Relied on for the Allowance of the Writ.

The Circuit Court of Appeals for the Second Circuit has decided an important question which is involved in a number of cases in which the parties have, pursuant to the provisions of Section 1002(*d*) of the Revenue Act of 1926, stipulated venue in a circuit court of appeals other than those of the circuits in which are located the offices of the collectors with whom the returns were filed.

This question has never been passed on by this Court but should be, and the court below should be reversed for the following reasons:

1. The court below has erred in its interpretation of the express provisions of the statute and has reached a conclusion contrary to the clearly stated meaning of Congress and contrary to well-settled rules of statu-

tory construction and contrary to judicially recognized rules of grammar and rhetoric.

2. The court below has refused to assume and exercise a jurisdiction expressly conferred on it by Congress by Section 1002(*d*) of the Revenue Act of 1926.

3. The decision of the court below conflicts directly with the conclusion reached by it in the case of Greylock Mills *v.* Commissioner of Internal Revenue, 31 Fed. (2d) 655, certiorari denied 50 S. Ct. 25; and with the decision of the Court of Appeals of the District of Columbia in Joy Floral Company *v.* Commissioner, 29 Fed. (2d) 865.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Second Circuit, and that the judgment of that court entered June 16, 1930, and amended July 16, 1930, be reversed by this Honorable Court, and that the cause be remanded for further proceedings on errors assigned in the petition to review the decisions of the United States Board of Tax Appeals.

THEODORE B. BENSON,
Counsel for Petitioner,
Washington, D. C

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 549

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion in the Circuit Court of Appeals for the Second Circuit was handed down on June 9, 1930, reported in 42 Fed. (2d) 192, and the order for mandate was entered on June 16, 1930, and an order recalling and amending order for mandate was entered July 16, 1930.

Order Extending Time for Application For Writ.

On motion of the petitioner and on September 12, 1930, the Honorable the Chief Justice of the United States entered an order extending the time for the filing of petition for a writ of certiorari for a period of 60 days from September 16, 1930.

The grounds stated in the motion for the extension of time were that the petitioner intended to make an application to the United States Circuit Court of Appeals for the Ninth Circuit for leave to amend the petition to review the decision of the Board of Tax Appeals to read "In the United States Circuit Court of Appeals for the Ninth Circuit" instead of "In the Circuit Court of Appeals for the Second Circuit", wherever the words appear in the title or body thereof. The application for leave to amend has been duly made by the petitioner and the Circuit Court of Appeals for the Ninth Circuit on October 27, 1930, stated that it felt that the motion should not be passed on until this Court has considered the question here involved and has decided whether or not the decision of the Circuit Court of Appeals for the Second Circuit in dismissing the petition for review of the decision of the Board of Tax Appeals is correct. A copy of the opinion of the Circuit Court of Appeals for the Ninth Circuit is printed as an appendix hereto.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under the Judicial Code, Section 240, as amended by the Act of

February 13, 1925, 43 Stat. 938, and Section 1003(*a*) of the Revenue Act of 1926, 44 Stat. 110.

The date of the judgment to be reviewed is June 16, 1930. The time for the filing of the application for the writ was extended to November 15, 1930. Application for the writ was presented November 15, 1930.

This is a corporation income tax case arising under the Revenue Acts of 1918 and 1921, in which an appeal was taken from the United States Board of Tax Appeals to the United States Circuit Court of Appeals for the Second Circuit, pursuant to a Stipulation of Venue (R. 23) entered into under the provisions of Section 1002(*d*) of the Revenue Act of 1926. The court below held that venue could not be so stipulated and entered an order dismissing the petition.

This Court has never construed Section 1002 of the Revenue Act of 1926 and has never considered the right of the parties to stipulate venue to review a decision of the Board of Tax Appeals in a circuit court of appeals other than the circuit in which is located the office of the collector to whom the return was made.

III.

Statement of the Case.

The petitioner and the respondent entered into a Stipulation of Venue for the review of the decision of the Board of Tax Appeals in the United States Circuit Court of Appeals for the Second Circuit (R. 23). The stipulation reads in part:

> "This agreement is made under and pursuant to the provisions of Section 1002 of the Revenue Act of 1926."

The Petition for Review was addressed to the Second Circuit and a transcript of the record was transmitted to such court.

IV.

The Statutes Involved.

The statutes here involved are Sections 1001 and 1002 of the Revenue Act of 1926 (44 Stat. 109, 110), relating to the review of a decision of the Board of Tax Appeals by a circuit court of appeals or by the Court of Appeals of the District of Columbia. Section 1002 of the Act reads:

> "SEC. 1002. Such decision may be reviewed:
>
> (*a*) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.
>
> (*b*) In the case of a person (other than an individual), except as provided in subdivision (*c*), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in the case such person made no return, then by the Court of Appeals of the District of Columbia.
>
> (*c*) In the case of a corporation which had no principal place of business, or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.
>
> (*d*) In the case of an agreement between the Commissioner and the taxpayer, then by the Cir-

cuit Court of appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement."

V.

Specification of Errors.

(1) The Circuit Court of Appeals for the Second Circuit erred in its construction of Section 1002(*d*) of the Revenue Act of 1926 and in holding that venue to review the decision of the Board of Tax Appeals could not be conferred on it by stipulation.

(2) The court below erred in refusing to assume and exercise the jurisdiction conferred on it by Section 1002(*d*) of the Revenue Act of 1926 in the case of an agreement.

VI.

Argument.

In Section 1002 Congress has defined the venue of an appeal from a decision of the Board. In the four subparagraphs of the section Congress has made separate provisions for different cases. In subparagraph (*b*) venue to review a decision of the Board in the case of a corporation is placed in the circuit court of appeals in which is located the office of the collector to whom the return was made. Had Congress not added any further provisions to the section the decision of the court below would be correct. Congress did, however, make a separate and distinct provision

in subparagraph (*d*) of the section which as applicable here reads:

> "In the case of an agreement * * * then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement."

Congress has provided for review in the case of an agreement and for review in the absence of an agreement. *In the case of an agreement* the review is in the circuit court of appeals or in the Court of Appeals of the District of Columbia as stipulated in such agreement. *In the absence of an agreement* the review, in the case of a corporation, is in the circuit court of appeals in which is located the office of the collector to whom the return was made.

Counsel submits that Section 1002 is to be read in accordance with its express terms to mean:

> "Such decision may be reviewed * * * in the case of an agreement * * * by the Circuit Court of Appeals for the circuit * * * as stipulated."

The decision of the court below is in direct conflict with the clearly expressed intent of Congress appearing in the wording and in the arrangement of the subparagraphs of Section 1002 of the Revenue Act of 1926.

The question here involved is one of importance, for counsel has been advised that stipulations of venue have been entered into in a number of cases to review the decisions of the Board of Tax Appeals. The position of counsel is recognized by Judge Wilbur of the

Ninth Circuit in the opinion handed down on the motion to amend the petition to review the decision of the Board of Tax Appeals, which opinion is printed as an appendix hereto.

In at least two cases which have been considered on review from the Board of Tax Appeals, the provisions of Section 1002(*d*) of the Revenue Act of 1926 have been followed. In Greylock Mills *v.* United States, 31 Fed. (2d) 655, certiorari denied, 50 S. Ct. 25, venue was stipulated in exactly the same manner as in this case and to the same circuit court of appeals. In that case the circuit court of appeals proceeded to consider the merits of the case and this court denied the writ with the result that the decision of the Board of Tax Appeals stands reviewed and the decision on review has become final.

In Joy Floral Company *v.* Commissioner, 29 Fed. (2d) 865, venue was stipulated to the Court of Appeals of the District of Columbia, which court reviewed the decision of the Board of Tax Appeals and the decision on review stands as the final determination of the matter in controversy.

The petitioner submits that the holding of the court below in this case conflicts directly with its holding in the Greylock Mills case and with the holding of the Court of Appeals of the District of Columbia in the Joy Floral Company case and for this reason the writ should be granted.

Conclusion.

The petitioner respectfully submits that the holding of the court below is clearly erroneous and in direct

conflict with the express provisions of Section 1002 of the Revenue Act of 1926 and with the decisions in the Greylock Mills *v.* United States, *supra*, and Joy Floral Company *v.* Commissioner, *supra*, and that this case is one of importance and calling for the exercise by this Court of its supervisory powers and to such end that the writ of certiorari be granted and that this Court should review the decision of the Circuit Court of Appeals for the Second Circuit and finally reverse it, and remand the case for further proceedings on the merits.

Respectfully submitted,

THEODORE B. BENSON,
Counsel for Petitioner,
Washington, D. C.

Of Counsel:
ARTHUR H. DEIBERT,
Washington, D. C.
M. F. MITCHELL,
GEORGE G. WITTER,
Los Angeles, California.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 6241.

NASH-BREYER MOTOR COMPANY, Formerly Troy Motor Sales Company, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Before RUDKIN and WILBUR, Circuit Judges, and KERRIGAN, District Judge.

WILBUR, *Circuit Judge:*

After a determination by a Board of Tax Appeals the Nash-Breyer Motor Company filed a petition for review by the United States Circuit Court of Appeals of the second circuit in pursuance of and in accordance with a stipulation entered into by the Commissioner of Internal Revenue and petitioner. The Circuit Court of Appeals of the second circuit dismissed the petition for lack of jurisdiction (Nash-Breyer Motor Co., etc., *v.* Commissioner, 42 F. (2d) 192 upon the authority of its decision in Mass. Fire & Marine Ins. Co. *v.* Commissioner of Internal Revenue, decided the same day (June 9, 1930, 42 F. (2d) 189) following the decision of the Circuit Court of Appeals of the eighth circuit in Spring Canyon Coal Co. *v.* Commissioner, 764 F. (2d) 764. The case was remanded to the Board of Tax Appeals without prejudice to further proceeding to

transfer review to the proper court. Petitioner applied to the Board of Tax Appeals to permit the amendment of the petition for review by inserting in lieu of the Circuit Court of Appeals of the second circuit the Circuit Court of Appeals of the ninth circuit. This application was denied.

The six months' period allowed by the statute for filing petition for review has expired. Application is now made to this court for leave to amend the petition for review by inserting therein the Circuit Court of Appeals of the ninth circuit in lieu of the Circuit Court of Appeals of the second circuit, upon the ground that jurisdiction has vested in this court. If, by virtue of the stipulation and the petition for appeal in pursuance thereof, jurisdiction was vested in the Circuit Court of Appeals of the second circuit, the decision of that court dismissing the petition would not give jurisdiction to this court, nor would the order of this court allowing the requested amendment in any wise change the situation. The primary question involved on this application is, therefore, whether or not the Circuit Court of Appeals of the second circuit acquired jurisdiction of the appeal herein from the Board of Tax Review.

After examining the above mentioned decisions, the statutes and legislative reports therein referred to, we feel that the question of jurisdiction is so doubtful that we should not in this proceeding pass upon it until the proposed petition to the Supreme Court by the Petitioner to review the above mentioned decision of the Circuit Court of Appeals of the second circuit has been acted upon by that court.

(Endorsed:) Opinion. Filed Oct. 27, 1930, Paul P. O'Brien, Clerk.

FILE COPY

FILED
FEB 25 1931
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 549.

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER,

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE.

BRIEF FOR PETITIONER.

THEODORE B. BENSON,
Washington, D. C.
Counsel for Petitioner.

ARTHUR H. DEIBERT,
M. F. MITCHELL,
GEORGE G. WITTER,
Of Counsel.

(35,471)

INDEX

Statement of the case 1
Opinion of the court below 1
Order extending time for application for writ 2
Jurisdiction 2
Statement of facts 2
Statutes involved 3
Specification of errors 4
The argument 5
Conclusion 11
Appendix 12

CASES CITED

Massachusetts Fire and Marine Insurance Company *v.* Commissioner, 42 F. (2d) 189 ..... 1, 5
Trustees for Ohio & Big Sandy Coal Company *v.* Commissioner, 43 F. (2d) 782 8
United Thacker Coal Company *v.* Commissioner, decided January 2, 1931, Circuit Court of Appeals, First Circuit, not reported, cited in Prentice-Hall Federal Tax Service, 1931, page 576 9

STATUTES CITED

Judicial Code, Section 240 2
Revenue Act of 1926:
Section 907 (e) 7
Section 1001 (a), 44 Stat. 109 ..... 1, 4
Section 1002, 44 Stat. 110 4
Section 1003 (a), 44 Stat. 110 2

CONGRESSIONAL REPORTS

House Report No. 1, 69th Congress, First Session, page 19 9
House Report No. 356, 69th Congress, First Session, page 54 10
Senate Report No. 52, 69th Congress, First Session, page 36 10

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 549.

NASH-BREYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, *Petitioner*,

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF FOR PETITIONER.

Statement of the Case.

The only question involved is the construction of Section 1002 of the Revenue Act of 1926 (44 Stat. 110), to determine the proper court of venue to review the decision of the United States Board of Tax Appeals; an agreement having been entered into between the Commissioner of Internal Revenue and the petitioner for review by the Circuit Court of Appeals for the Second Circuit.

I.

Opinion of the Court Below.

The opinion in the Circuit Court of Appeals for the Second Circuit was handed down on June 9, 1930, reported in 42 F. (2d) 192, and the order for mandate was entered on June 16, 1930, and an order recalling and amending order for mandate was entered July 16, 1930.

The court below followed its decision in *Massachusetts Fire and Marine Insurance Company* v. *Commissioner of Internal*

Revenue, 42 F. (2d) 189, the opinion in which case is printed as an appendix to this brief.

Order Extending Time for Application for Writ.

On motion of the petitioner and on September 12, 1930, the Honorable the Chief Justice of the United States entered an order extending the time for the filing of a petition for a writ of certiorari for a period of 60 days from September 16, 1930 (R. 35).

II.

Jurisdiction.

The jurisdiction of this Court is invoked under the Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, and Section 1003(a) of the Revenue Act of 1926, 44 Stat. 110.

The date of the judgment to be reviewed is June 16, 1930 (R. 34). The time for the filing of the application for the writ was extended to November 15, 1930 (R. 35). Application for the writ was presented November 15, 1930, and was granted January 5, 1931.

III.

Statement of the Facts.

The petitioner duly filed its return of income and profits taxes for the fiscal years June 30, 1920 and 1921, with the collector of internal revenue at Los Angeles, California.

On November 23, 1925, the petitioner filed with the Board of Tax Appeals a petition for the redetermination of a deficiency in the amount of $6,139.88 for the year June 30, 1921, and on February 6, 1926, the petitioner filed with the Board a petition for the redetermination of a deficiency, in the amount of $7,489.25 for the year June 30, 1920. Thereafter the petitioner filed an amended petition and the causes were consolidated and came on for hearing before the Board and the issues raised in the amended petition and the amended answer were decided

by the Board adversely to the petitioner and the Board on March 16, 1929, entered its orders of redetermination.

On August 2, 1929, there was filed with the Board of Tax Appeals a stipulation of venue in which the parties agreed by their respective attorneys that the decision of the Board might be reviewed by the United States Circuit Court of Appeals for the Second Circuit. The said stipulation of venue reads as follows (R. 23):

> "It is hereby agreed and stipulated by and between the parties in the above entitled cause, by their respective attorneys, that the decision and orders of the United State Board of Tax Appeals in the said cause, dated the 16th of March, 1929, redetermining the amount of income and profits taxes of the said Troy Motor Sales Company for the fiscal years ending June 30, 1920, and June 30, 1921, may be reviewed by the United States Circuit Court of Appeals for the Second Circuit.
>
> This agreement is made under and pursuant to the provisions of Section 1002 of the Revenue Act of 1926."

On August 2, 1929, the petitioner filed with the Board its petition for review of the decisions. The petition was for review by the United States Circuit Court of Appeals for the Second Circuit. On the same day a copy of the petition was served on the respondent.

The cause came on for a hearing before the United States Circuit Court of Appeals for the Second Circuit on May 12, 1930, and on June 9, 1930, that court decided that venue could not be stipulated by the parties and entered an order dismissing the petition.

IV.

The Statutes Involved.

The statutes here involved are Sections 1001 (a) and 1002 of the Revenue Act of 1926 (44 Stat. 109, 110), relating to the review of a decision of the Board of Tax Appeals by a circuit court of appeals or by the Court of Appeals of the District of Columbia. The said sections read as follows:

"Sec. 1001 (a). The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 383 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered."

"Sec. 1002. Such decision may be reviewed:

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual) except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in the case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business, or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement."

V.

Specification of Errors.

(1) The Circuit Court of Appeals for the Second Circuit erred in its construction of Section 1002(d) of the Revenue Act of 1926 and in holding that venue to review the decision of the Board of Tax Appeals could not be conferred on it by stipulation.

(2) The court below erred in refusing to assume and exercise the jurisdiction conferred on it by Section 1002(d) of the Revenue Act of 1926 in the case of an agreement.

VI.

The Argument.

The position of the petitioner is that Section 1002(d) of the Revenue Act of 1926 is to be read, according to its terms and according to well recognized rules of statutory construction as well as recognized rules of grammar, to mean that a decision of the Board of Tax Appeals may, in the case of an agreement, be reviewed by either the Circuit Court of Appeals for the circuit as stipulated, or by the Court of Appeals of the District of Columbia as stipulated. In other words that it is within the power of the parties under subsection (d) to stipulate venue in a circuit court of appeals other than the court for the circuit defined in the preceding subsections of Section 1002.

The court below held in *Massachusetts Fire and Marine Insurance Company* v. *Commissioner*, 42 Fed. (2d) 189, the opinion in which case was adopted in the present case, that the parties could stipulate for review in the Court of Appeals of the District of Columbia but could not stipulate for review by a circuit court of appeals other than that defined in preceding subsections. In reaching this conclusion the court read out of the statute the words "then by the Circuit Court of Appeals for the circuit * * * as stipulated in such agreement" and based its decision on the reasoning that "Congress has never before given such latitude, but had distributed suits in accordance with their territorial incidence" and that the legislative history of Section 1002(d) discloses that the right to stipulate review by a circuit court of appeals is confined to cases in which there is doubt as to the proper court of venue. The petitioner submits that the reasoning of the court below is not sound and that the conclusion reached is in direct conflict with the express terms of the statute.

Section 1002 consists of four separate and distinct subsections. Subsection (a) defines the court of review in the case of an individual. Subsection (b) defines the court of review in the case of a domestic corporation and subsection (c) in the case of a foreign corporation. These three subsections which made up the section as originally introduced in the House as Section 913 of the Revenue Act of 1926, H. R. No. 1, 69th

Congress, 1st Session, define the court of review in the absence of an agreement and, had Congress not amended Section 913 by adding thereto subsection (d) and by passing it as Section 1002, the decision of the court below, that review should have been sought in the Circuit Court of Appeals for the Ninth Circuit, would be correct. Congress did, however, add subsection (d) to the statute and passed it as Section 1002. This appears to have been deliberately done and there appears in the statute and in the legislative history the manifest intent of Congress that the provision for review "in the case of an agreement" is separate and distinct from the review provided for in the preceding subsections, and that the parties can by agreement stipulate the court of review and that in such case the provisions of subsections (a) and (b) have no application.

Subsection (d) is clear on its face and is full and complete. It reads and must be construed to mean that in the case of an agreement the decision of the Board may be reviewed either "by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated * * *" The adverbial clause "by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated," modifies the verb "may be reviewed." The clause is introduced by the preposition "by" which appears before the words "Circuit Court of Appeals" and which is not repeated before the words "Court of Appeals of the District of Columbia." The words "Circuit Court of Appeals for the circuit" and "the Court of Appeals of the District of Columbia" are separated by the conjunction "or." The review may, therefore, by "by" the circuit court of appeals "or" by the Court of Appeals of the District of Columbia. The courts are named in the alternative. The phrase "as stipulated in such agreement" modifies either the circuit court of appeals for the circuit "or" the Court of Appeals of the District of Columbia, whichever is stipulated. Subsection (d) must, therefore, be read to mean that review may be by either the Circuit Court of Appeals as stipulated or the Court of Appeals of the District of Columbia as stipulated, and not to mean by the circuit court of appeals as referred to in subsections (a)

and (b) and as held by the court below. In subsection (d) no reference is made to the preceding subsections and the court below erred in holding that the words "the circuit" mean the circuit of the inhabitance of an individual or the circuit in which is located the collector with whom a corporation return was filed. The court below should have held that "the circuit" is the one stipulated in the agreement. The court below has failed to follow the provisions of the statute and the conclusion reached by it is in direct conflict with the express provisions of subsection (d) of Section 1002.

The court below gave serious consideration to the fact that Congress has apparently departed from the policy of prior legislation with reference to the venue of a cause of action and that Congress has placed no territorial limitations thereon but on the contrary has placed it within the power of the parties to select the circuit and has given the parties "the whole scope of the Union for their choice." In the course of its opinion the court further stated:

> "So far as we know, Congress has never before given such latitude but has distributed suits in accordance with their territorial incidence."

It is true that Section 1002(d) is novel in that it defines venue in the appellate courts and counsel has been unable to find any legislation which parallels it. Other statutes having to do with venue uniformly relate to trial courts. The statute under consideration is, however, one which relates to the review of income and estate tax cases which cover "the whole scope of the Union" and as to which there is no "territorial incidence."

Congress has clearly recognized this in Section 907(a) of the Revenue Act of 1926 with reference to the times and places of sittings of the Board of Tax Appeals which reads as follows:

> "The principal office of the Board shall be in the District of Columbia, but the Board or any of its divisions may sit at any place within the United States. The times and places of the meetings of the Board and of its divisions shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the Board or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable."

It is to be noted that with reference to the times and places of the meetings of the Board that the provision of the statute is expressly stated to be to secure a reasonable opportunity to taxpayers to appear "with as little inconvenience and expense to taxpayers as is practicable." Congress has here expressly stated that the times and places of the meetings of the Board shall conform to the convenience of the taxpayers and the petitioner submits that a like intent appears in Section 1002(d) of the Revenue Act of 1926. There is no territorial incidence in these tax cases except that defined by subsections (a) and (b) of Section 1002 which the petitioner submits must be construed to give way to subsection (d) in the case of an agreement.

It is true that in subsection (a) Congress referred to the inhabitance of an individual but in subsection (b) reference is made to the circuit in which is located the office of the collector to whom the return was made. It is true that corporation returns should be made to the collector in which is located the principal office of the corporation. It is of course often difficult to determine what is the principal office of the corporation and as a practical matter the Commissioner of Internal Revenue has never questioned the right of a corporation to file a return in any particular collector's office. The practice has been for collectors to continue to send out returns to corporations from whom returns were received in prior years with the result that many corporations have continued to file returns in districts not strictly proper, and had subsection (d) not been added to Section 1002 and had corporations been required to seek review in the circuits in which the returns were filed great inconvenience would have resulted in many cases.

Section 1002 relates to the court of review and defines venue in such case. It does not define the venue of a trial court and the questions relating to the expense of producing witnesses and other expenses and inconveniences incidental to the trial of a case not present. Section 1002 has to do merely with appellate procedure and attendance is required of attorneys only. A clear illustration of the necessity for the enactment of subsection (d) and the wisdom in doing so appears in the cases of *Trustees for Ohio and Big Sandy Coal Company* v. *Com-*

missioner, 43 F. (2d) 782, decided September 19, 1930, and *United Thacker Coal Company* v. *Commissioner*, decided January 2, 1931, by the Circuit Court of Appeals for the First Circuit, not reported but cited in Prentice-Hall Federal Tax Service, 1931, page 576. These cases were consolidated and heard together before the Board of Tax Appeals, 15 B. T. A. 273, and then in the absence of an agreement, one was appealed to the First Circuit and the other to the Fourth Circuit with the result that directly opposite conclusions were reached by the two courts on one of the principal questions involved, that of affiliation.

The court below referred to the Congressional history of Section 1002 and to the references made in both the House and Senate Reports to cases of doubt as to the proper court of venue and the court concluded that subsection (d) should be confined to such cases of doubt.

The legislative history of Section 1002 shows that it was originally introduced as Section 913 of the Revenue Act of 1926, entitled "Court Review of Board's Decision," H. R. No. 1, 69th Congress, 1st Session, and was comprised of what is now substantially subsections (a), (b) and (c) of Section 1002. The section was amended in the Senate by changes in subsection (b), not here material, and by adding thereto subsection (d).

The Reports of the House and Senate read as follows:

House Report No. 1, at page 19:

> "Court review—Venue.—Under section 912 of the proposed new law the taxpayer is given the right to obtain a review of the board's decision (whether determining a deficiency, dismissing on motion a petition, or assessing damages for frivolous appeal) by the Circuit Court of Appeals of the United States or the Court of Appeals of the District of Columbia. The venue on review in any particular case is designated as follows: (1) In the case of an individual the test is the same as for venue under section 51 of the Judicial Code, except that in the case of the nonresident individual, the decision will be reviewed by the Court of Appeals of the District of Columbia; (2) in the case of partnerships, associations, corporations, trusts, and estates, the review will be given by the court for the

circuit in which is located the office of the collector to whom the return was made, a provision similar to that for venue in suits for refunds; and (3) in the case of non-resident or foreign corporations, the Court of Appeals of the District of Columbia will review the decision. The above provisions as to venue relieve the difficulties involved in joint returns and determination of the principal place of business, and further prevent undue burden upon those circuits embracing States in which a vast number of corporations are organized."

Senate Report No. 52, at page 36:

"Court review—Venue.—Under the House bill, in cases of corporations, a decision of the board was to be reviewed, in case no return was made, by the circuit court of appeals for the circuit in which is located the office of the collector to whom the corporation should have made the return. Because of the indefiniteness of the law prescribing where a return should be filed, the committee amendment provides that in such case the decision may be reviewed by the Court of Appeals of the District of Columbia. A provision is also inserted permitting the commissioner and the taxpayer, whether individual or corporation, to stipulate the court to which the review will be taken, in order that any doubt as to the proper court may be removed by stipulation, whether before or after the petition is filed."

House Report No. 356—Conference Report at page 54:

"Amendment No. 151: Under the House bill, in case of a corporation which had failed to make a return, a decision of the board would be reviewed by the circuit court of appeals for the circuit in which is located the office of the collector to whom the corporation should have made the return. The amendment provides that in such case the decision may be reviewed by the Court of Appeals of the District of Columbia, and also provides that the Commissioner and the taxpayer may, in any case, stipulate the court to which the review will be taken, in order to remove any doubt as to the proper court; and the House recedes."

The petitioner submits that there appears in the legislative history of the section and in the comments of the Committees

nothing to support the conclusion of the court below that the right to stipulate venue is confined to cases of doubt, but on the contrary there appears the intent of Congress that the Commissioner and the taxpayer may, to use the words of the conferees, "in any case, stipulate the court to which review may be taken, * * *."

It is true that in the reports of the Committees of the House and Senate statements appear to the effect that the stipulation is in order that any doubt as to the proper court may be removed. The reference to the removal of the doubt as to the proper court is merely an expression of a motive on the part of Congress for the legislation and not a part of the legislation nor to be read into the statute as a limitation on the right to stipulate "in any case."

The quotation from the House Report, No. 356, page 54, by the court below is not complete and fails to give the full meaning of the Committee which is that the amendment provides for venue in the case of a corporation which failed to make a return "and also provides that the Commissioner and the taxpayer may, in any case, stipulate the court to which the review will be taken, in order to remove any doubt as to the proper court * * *."

Conclusion.

The petitioner submits that Section 1002 (d) is, according to its express terms, to be construed to mean that, in the case of an agreement, the review of the decision of the Board of Tax Appeals may be by either the Circuit Court of Appeals for the circuit or by the Court of Appeals of the District of Columbia as stipulated, and that the legislative history of the section discloses that Congress intended that the parties may so stipulate in any case.

Respectfully submitted,

THEODORE B. BENSON,
Counsel for Petitioner,
Washington, D. C.

APPENDIX

Massachusetts Fire and Marine Insurance Company, Petitioner, v. Commissioner of Internal Revenue, Respondent.

United States Court of Appeals for the Second Circuit. Decided June 9, 1930, 42 F. (2d) 189.

Before L. Hand, Chase, and Mack, Circuit Judges.

L. HAND, Circuit Judge: The taxpayer, a Massachusetts corporation, filed its income tax return for 1920 with the collector of internal revenue in Boston, on which the Commissioner assessed the tax now in dispute. The taxpayer then petitioned the Board of Tax Appeals to review the assessment, and the Board affirmed the Commissioner. Thereupon the taxpayer filed a petition for review in this court, and the parties stipulated in supposed accordance with §1225 (d) of Title 26 of the United States Code that we should hear the case. Our jurisdiction depends upon whether the stipulation covers such a case, the contrary having been held by the Circuit Court of Appeals for the Eighth Circuit in *Spring Canyon Coal Co.* v. *Commissioner*, 38 Fed. (2) 764. Unless the stipulation was within §1225 (d), the case is not properly here, and for obvious reasons we may not decide it because the parties agree.

Section 1225 prescribes those courts of appeal which are to review decisions of the Board. Under subdivision (a), "in the case of an individual" taxpayer, the appeal is to be heard by the Circuit Court of Appeals "for the circuit whereof he is an inhabitant, or if he is not an inhabitant of any circuit then by the Court of Appeals of the District of Columbia." Under subdivision (b) "in the case of a person (other than an individual) except as provided in subdivision (c)," the appeal is to be heard "by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return; or in case such person made no return, then by the Court of Appeals of the District." Subdivision (c) requires the Court of Appeals of the District to hear such cases as arise when a corporation has no "principal place of business, or principal office or agency in the United States." Subdivision (d), that here in question, reads as follows: "In the case of an agreement between the commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement." The question is whether the phrase, "as stipulated in such agreement" gives the parties power in all cases to select their court, regardless of the preceding subdivisions,

or whether it only authorizes a choice between "the Circuit Court of Appeals for the circuit," as defined by the earlier subdivisions, and the Court of Appeals for the District. We agree with our brothers of the Eighth that it means the second, and at the outset we observe, as they did, that it would be an egregious exception to common practice to give suitors the whole scope of the Union for their choice. Such an option may well result in an undesirable distribution of judicial business, a consideration especially applicable to this Circuit to which in any case large numbers of such cases must inevitably fall. So far as we know, Congress has never before given such latitude, but has distributed suits in accordance with their territorial incidence. A contrary purpose ought to be pretty clear, if we are to construe the words otherwise.

They were not happily chosen unless we are right; rather we should expect them to read: "by any Circuit Court of Appeals or the Court of Appeals of the District, as may be stipulated in the agreement." The actual phrase, "by the Circuit Court of Appeals for the circuit," seems to go back to the circuit prescribed in the earlier sub-divisions, and to offer that alone as an alternative to the Court of Appeals of the District. It is true that this involves an interpolation so that the clause reads: "by the Circuit Court of Appeals for the circuit as heretofore defined"; but the liberty so taken with the text is altogether consonant with the purpose of the section as a whole. Indeed, were the matter to be left at large to the consent of the parties, we should expect the broad consent to stand at the outset, and provision for those cases in which the parties could not agree, to follow.

The reasons which might have prompted giving any choice were, so far as we can see, two; first the convenience of the parties, and second, the settlement of doubts as to jurisdiction. The first would plainly limit the choice between the District, always the most accessible to the commissioner, and the place where the taxpayer lived, or had its principal office, if a corporation. To admit a wider choice would recognise motives which we can scarcely suppose would have had the ear of Congress. In fact, however, as the history of the section shows, the convenience of the parties had nothing to do with the matter but the removal of doubts. In the case of an individual these might be very real, for "inhabitancy" is a troublesome issue, as the books prove. It is true that subdivision (b) sets a test which seems too clear for question, but subdivision (c) could raise doubts, like those which have caused so much litigation as to personal service on corporations. The parties might in such case go to the District, as in cases where no corporate

return was filed, thus avoiding any question; or they might select the circuit where the taxpayer was thought to live, or to have its principal office, if a corporation, in which event the stipulation would avoid nice questions as to its propriety. We can not suppose that under color of laying doubts, it was intended to allow them to go to a court which nobody claimed to have any jurisdiction under the earlier subdivisions.

When originally introduced in the House the section did not contain subdivision (d) at all, and provided, in the case of a corporation which made no return, that the review should be by that Circuit Court of Appeals where the return should have been filed, (§992 (b) of Title 26). The accompanying committee report, (House Reports, Vol. I, Report No. 1, 69th Congress, 1st Session, p. 19), declared that the first subdivision was drawn to accord with the test laid down in section 51 of the Judicial Code, "inhabitancy," as was apparent; that the second was to make the place of return the test for corporations and the like; and the third, to give the Court of Appeals of the District jurisdiction only in the case of non-resident or foreign corporations. The report concluded: "The provisions as to venue * * * prevent undue burdens upon those circuits embracing States in which a vast number of corporations are organized."

The Senate Committee in its report (Senate Reports, Vol. 1, Report No. 52, 69th Congress, 1st Session, p. 36), thought that difficulty would arise in determining where returns ought to be filed by corporations which filed none, and gave such cases to the District. They added subdivision (d), which permitted "the commissioner and taxpayer, whether individual or corporation, to stipulate the court to which the review may be taken, in order that any doubt as to the proper court may be removed by stipulation, whether before or after the petition is filed." While it is true that, read broadly, this appears to give an unlimited choice, it is apparent that the purpose was no more than to remove doubts as to the "proper court." This seems to us to circumscribe the meaning, and to accord with the view which we take. Certainly it can not be argued that it was necessary to open all ten circuits, in order to put the jurisdiction beyond question.

The House receded as to both amendments, and its conferees' report, (House Reports, Vol. 1, 69th Congress, 1st Session, Report No. 356, p. 54), concludes almost in the words of the Senate Report: "the commissioner and taxpayer may, in any case, stipulate the court to which the review will be taken, in order to remove any doubt as to the proper court." The implica-

tions appear to us the same, and in any event we should hesitate to ascribe to the conferees a departure from the original purpose of the House to prevent an unequal distribution of appeals; a purpose which our own experience already leads us to believe may be frustrated, if the language of the report be broken from its setting. Our conclusion is that while nothing very positive is to be gained from the committee reports, it is at least apparent that the declared aim of subdivision (d) is completely secured by limiting the choice between circuits where the taxpayer has some color of residence, and the District of Columbia.

A similar case was before us in *Greylock Mills* v. *Commissioner*, 31 Fed. (2) 655, but we failed to observe the point, and neither side called it to our attention. Others are now before us which must follow this ruling. In saying that the question was decided in *Spring Canyon Coal Co.* v. *Commissioner*, we do not forget that the case eventually went off upon another point. That does not destroy the force of the reasoning there used.

While we are loath to dispose of the case on this ground, it is perhaps not improper to say that the petitioner has in fact lost nothing by our failure to decide the case upon the merits.

Petition to review dismissed for lack of jurisdiction.

FILED
DEC 18 1930
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 549

In the Supreme Court of the United States

OCTOBER TERM, 1930

NASH-BREWER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 549

NASH-BRUYER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, petitioner

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

The respondent does not oppose the petition.

The petitioner and the respondent stipulated that the decision of the Board of Tax Appeals should be reviewed by the Circuit Court of Appeals for the Second Circuit. (R. 23.) That court held that it had not jurisdiction of the petition for review, under Section 1002(d) of the Revenue Act of 1926 (copied on p. 8 of petitioner's brief) on the ground that, as the petitioner was a corporation which filed its return in California (R. 20-21), the

only courts having jurisdiction were the Circuit Court of Appeals for the Ninth Circuit and the Court of Appeals of the District of Columbia. (R. 34.) The *per curiam* opinion followed the opinion of the same court in *Massachusetts Fire & Marine Insurance Co.* v. *Commissioner*, 42 F. (2d) 189, which was handed down at the same time.

Support for this decision is found in *Spring Canyon Coal Co.* v. *Commissioner*, 38 F. (2d) 764 (C. C. A. 8th). We believe that no other Circuit Court of Appeals has taken this view of the statute, although there have been similar situations in the other Circuit Courts of Appeals. We are aware of no case in which any other court has discussed the question. The Circuit Court of Appeals for the First Circuit took jurisdiction in a case in which the record presented a similar situation. *Simmons Co.* v. *Commissioner*, 33 F. (2d) 75. (This Court denied certiorari, 280 U. S. 563, but the question of jurisdiction was not suggested to this Court.)

In *Fowler* v. *Commissioner of Internal Revenue*, 42 F. (2d) 837 (C. C. A. 2d) a similar situation was presented. It appeared in the petition that the taxpayer was a resident of California. Final decree in that case was entered by the Circuit Court of Appeals for the Second Circuit after date of the entry of final decree in the instant case. Although the matter was subsequently called to the attention of the court, it declined to vacate its judgment. (That case is pending before this Court on petition

for a writ of certiorari as No. 580, but the Government did not assign as error the action of the court in taking jurisdiction of the petition.)

The question decided in the instant case is an important one which ought to be settled.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
SEWALL KEY,
J. LOUIS MONARCH,
Special Assistants to the Attorney General.

DECEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	10
Appendix A (legislative history)	11
Appendix B (statutory provisions relating to jurisdiction of the Circuit Courts of Appeals in various classes of cases)	14

CITATIONS

Cases:	
Fowler v. *Commissioner of Internal Revenue*, 42 F. (2d) 887	9
Massachusetts Fire and Marine Ins. Co. v. *Commissioner of Internal Revenue*, 42 F. (2d) 190	6, 8
Old Colony Trust Co. v. *Commissioner of Internal Revenue*, 279 U. S. 716	7
Simmons v. *Commissioner of Internal Revenue*, 33 F. (2d) 75, certiorari denied, 280 U. S. 566	8
Spring Canyon Coal Co. v. *Commissioner of Internal Revenue*, 33 F. (2d) 704	5
Statutes:	
Act of September 26, 1914, c. 311, Sec. 5, 38 Stat. 717, 719 (U. S. C., Title 15, Secs. 45, 46)	17–18
Act of October 15, 1914, c. 323, Sec. 11, 38 Stat. 730, 734–736 (U. S. C., Title 15, Sec. 21)	17
Act of August 15, 1921, c. 64, Sec. 204, 42 Stat. 179, 182–183 (U. S. C., Title 7, Sec. 194)	19–20
Act of September 21, 1922, c. 369, Sec. 6, 42 Stat. 996, 1002 (U. S. C., Title 7, Sec. 9)	18–19
Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 225)	14
Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110:	
Sec. 1001 (U. S. C. App., Title 26, Sec. 1224)	20
Sec. 1002 (U. S. C. Sup. IV, Title 26, Sec. 1225)	3, 20–21
Sec. 1003 (U. S. C. Sup. IV, Title 26, Sec. 1226)	21
Congressional documents:	
H. R. No. 1, 69th Cong., 1st sess., p. 285	13
House Report No. 1, 69th Cong., 1st sess., pt. 1	9–10, 11
House Report No. 356, 69th Cong., 1st sess., p. 54	12
Senate Report No. 52, 69th Cong., 1st sess., p. 26	6, 12

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 549

NASH-BRESLER MOTOR COMPANY, FORMERLY TROY MOTOR SALES COMPANY, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals is reported in 14 B. T. A. 546. The opinion of the Circuit Court of Appeals (R. 33–34) is reported in 42 F. (2d) 192.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 16, 1930. (R. 34.) This Court on September 12, 1930, extended the time within which petition for certiorari might be filed for a period of sixty days from September 16, 1930. (R. 35.) Petition for certiorari was filed on No-

vember 15, 1930, and certiorari was granted on January 5, 1931. (R. 37.) The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the Commissioner and a corporate taxpayer stipulate that a decision of the Board of Tax Appeals may be reviewed by a Circuit Court of Appeals other than that for the circuit in which is located the office of the collector to whom the taxpayer made its tax return, has that Circuit Court of Appeals jurisdiction under Section 1002 of the Revenue Act of 1926?

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. Sup. IV, Title 26, Sec. 1225):

VENUE

SEC. 1002. Such decision may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the re-

turn, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement.

STATEMENT

The taxpayer, a corporation organized under the laws of Delaware, had its principal office at Los Angeles, California, and was engaged in buying and selling automobiles in Southern California and Arizona. It filed income and profits tax returns for the years in question with the Collector of Internal Revenue for its district (presumably, Los Angeles, California). (R. 20–21.) The Commissioner determined deficiencies for the years in question, from which the taxpayer appealed to the Board of Tax Appeals. (R. 7–10, 10–12.) After a hearing before the Board, the Board entered orders of redetermination showing deficiencies and also unpaid tax liabilities. (R. 21, 22.) Before the filing of a petition for review of the Board's decision, the attorney for the taxpayer and the attorney for the Commissioner signed and filed the

following stipulation, which is a part of the record (R. 23-24):

> It is hereby agreed and stipulated by and between the parties in the above-entitled cause, by their respective attorneys, that the decision and orders of the United States Board of Tax Appeals in the said cause, dated the 16th of March, 1929, redetermining the amount of income and profits taxes of the said Troy Motor Sales Company for the fiscal years ending June 30, 1920 and June 30, 1921, may be reviewed by the United States Circuit Court of Appeals for the Second Circuit.
>
> This agreement is made under and pursuant to the provisions of Section 1002 of the Revenue Act of 1926.

Thereafter, the taxpayer filed a petition for review in the Circuit Court of Appeals for the Second Circuit, setting forth that the parties had agreed that the review should be in that court, as evidenced by the above-mentioned stipulation. (R. 24.) The Circuit Court of Appeals for the Second Circuit dismissed the petition for lack of jurisdiction, without prejudice to the petitioner's right to a review by the proper Circuit Court of Appeals. (R. 34, 35.)

ARGUMENT

The question as to whether or not the Circuit Court of Appeals had jurisdiction under Section 1002 (d) of the Revenue Act of 1926 in this case

was not raised by the Commissioner or Internal Revenue but by the court itself.

Section 1002 (d) has been construed in three different ways:

(1) The petitioner construes it to authorize a review in the Circuit Court of Appeals for any circuit agreed upon by the taxpayer and the Commissioner. The arguments in support of this contention will be found in the brief for the petitioner.

(2) The Circuit Court of Appeals for the Eighth Circuit in *Spring Canyon Coal Co.* v. *Commissioner of Internal Revenue*, 38 F. (2d) 764, construed paragraph (d) as permitting the Commissioner and the taxpayer to stipulate for an appeal from the Board of Tax Appeals either to the Court of Appeals of the District or that Circuit Court of Appeals which is designated for the case under paragraphs (a), (b), and (c). If the statute should be construed in this way, it was unnecessary to include in paragraph (d) any reference to Circuit Courts of Appeals, because in view of the preceding provisions in paragraphs (a), (b), and (c), no stipulation would be necessary to lay the venue there. Under this construction, a stipulation would be necessary only in order to procure a hearing before the Court of Appeals of the District in a case in which that court was not specifically designated as the proper court in paragraphs (a), (b), or (c).

(3) The Circuit Court of Appeals for the Second Circuit has apparently adopted a construction slightly different from that adopted in the *Spring Canyon Coal Co. case, supra.* The arguments in favor of this construction are set forth in the opinion of that court in *Massachusetts Fire and Marine Insurance Co. v. Commissioner of Internal Revenue*, 42 F. (2d) 189, which was followed in this case. That case construes Section 1002 as permitting the parties to stipulate for appeal to the Court of Appeals of the District or the Circuit Court of Appeals for any Circuit in which it may appear that there is some reason to believe venue would lie under subparagraph (a), (b), or (c).

For the latter construction the court below relies particularly upon the legislative history of the section, and especially the statement in the report of the Senate Committee that subparagraph (d) was added "in order that any doubt as to the proper court may be removed by stipulation." Senate Reports, Volume 1, Rep. No. 52, 69th Cong., 1st Sess., p. 36 (p. 12, *infra*). In Appendix A hereof we give the legislative history of the Act. It seems to us doubtful whether, taken as a whole, it supports the conclusion of the court below. In view of the fact that the Senate, in order to remove doubt, added subdivision (d) of this section, it would seem that doubt as to the proper circuit could arise only in those cases in which it is doubtful whether an individual taxpayer is an inhabitant of one circuit or of

another and in those very rare cases where there is question whether a corporation which has not filed a return had or had not a place of business or an office in the United States.

It should be pointed out that Section 1002(c) relates only to venue and not to the jurisdiction of the Circuit Courts of Appeals. This is plain from the heading of Section 1002. Section 1003 expressly relates to jurisdiction. In considering the constitutionality of the provisions for review of the decisions of the Board of Tax Appeals in *Old Colony Trust Company* v. *Commissioner of Internal Revenue*, 279 U. S. 716, this Court said, at page 726:

> By Section 1002 it is provided in what venue the decision may be reviewed.

While it is true, as suggested by the court below, that the venue of the Federal courts usually depends upon the territorial situation of the parties, this is not universally so. In Appendix B to this brief (pp. 14–21, *infra*) the provisions of various statutes relating to review by the Circuit Courts of Appeals are set forth. It appears that the venue of the Circuit Courts of Appeals under those statutes does not always depend upon the territorial location of the litigants. This is particularly true in connection with applications by the Interstate Commerce Commission, Federal Reserve Board and Federal Trade Commission, which are given a certain latitude in selecting the Circuit Court of Appeals to which application will be made. Nowhere, however, is the selection of the Circuit

Court of Appeals left without limit to the stipulation of the parties, unless the present statute is so construed.

The court below also suggested that if paragraph (d) were to be given the construction for which the petitioner contends, it would be a departure from the usual provision that the venue of the Federal courts depends upon the "territorial incidence" of suits. The court also suggested that a construction "to admit a wider choice [than that allowed by the view of that court] would recognize motives which we can scarcely believe would have had the ear of Congress." 42 F. (2d) 189, 190, 191.

We know of no discussions of the point here involved except those in the cases referred to above. The Commissioner has in a number of cases entered into stipulations with taxpayers for appeals before various Circuit Courts of Appeals without regard to whether there was any basis for believing that they were the courts designated by paragraphs (a), (b), and (c) of Section 1002. The Circuit Court of Appeals for the First Circuit took jurisdiction in a case in which apparently the sole basis therefor was a stipulation. Although we are informed that the court considered the question, it did not mention it in its opinion. *Simmons* v. *Commissioner of Internal Revenue*, 33 F. (2d) 75. This Court denied certiorari (280 U. S. 588), but the question of venue or jurisdiction was not suggested to this Court.

In *Fowler v. Commissioner of Internal Revenue*, 42 F. (2d) 837, a similar situation was presented to the Circuit Court of Appeals for the Second Circuit. Although final decree in that case was entered by that court after the date of final decree in the present case and although the disposition of the present case was called to its attention, the court declined to vacate its judgment.

If the construction contended for by the petitioner is correct, the judgment should be reversed. If either of the other constructions indicated above is correct, the judgment should be affirmed.

While the proper construction of paragraph (d) is not free from doubt, we suggest that the interests of orderly administration in connection with appeals from the Board of Tax Appeals and the disposition of such appeals by the several Circuit Courts of Appeals would be promoted by the construction adopted by the court below. An unlimited choice of venue may well result in overburdening with such appeals courts whose dockets are already overcrowded with such cases, and it is noteworthy that the original House Report in connection with the Revenue Act of 1926 states: "The above provisions[1] as to venue * * * prevent undue burden upon those circuits embracing States

---

[1] The bill discussed in this report, however, did not contain the provisions which became subparagraph (d).

in which a vast number of corporations are organized." House Report No. 1, 69th Cong., 1st Sess. (p. 11, *infra*).

It should be noted, in passing, that while the court below said in its opinion that the taxpayer "has suffered nothing from dismissal," the Circuit Court of Appeals for the Ninth Circuit has indicated that it will not assume jurisdiction of this case because more than six months have expired since the decision, although it concluded that it should not pass upon the question finally until action has been taken by this Court. 44 F. (2d) 376.

CONCLUSION

From the standpoint of the Government the question is of very little importance. From the standpoint of the administration of justice in the Circuit Courts of Appeals we believe it is of importance that the decision below be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

CLAUDE R. BRANCH,
J. LOUIS MONARCH,
MORTON K. ROTHSCHILD,
Special Assistants to the Attorney General.

WHITNEY NORTH SEYMOUR,
Attorney.

APRIL, 1931.

APPENDIX A

LEGISLATIVE HISTORY

Extract from Report of House Committee on Ways and Means.

(House Reports, Vol. I, Report No. 1, 69th Congress, 1st Session, page 19)

Court review—Venue.—Under section 912 of the proposed new law the taxpayer is given the right to obtain a review of the board's decision (whether determining a deficiency, dismissing on motion a petition, or assessing damages for frivolous appeal) by the Circuit Court of Appeals of the United States or the Court of Appeals of the District of Columbia. The venue on review in any particular case is designated as follows: (1) In the case of an individual the test is the same as for venue under section 51 of the Judicial Code, except that in the case of the nonresident individual, the decision will be reviewed by the Court of Appeals of the District of Columbia; (2) in the case of partnerships, associations, corporations, trusts, and estates, the review will be given by the court for the circuit in which is located the office of the collector to whom the return was made, a provision similar to that for venue in suits for refunds; and (3) in the case of nonresident or foreign corporations, the Court of Appeals of the District of Columbia will review the decision. The above provisions as to venue relieve the difficulties involved in joint returns and determination of the principal place of business, and further prevent undue burden upon those circuits embracing States in which a vast number of corporations are organized.

Extract from report of the Senate Committee on Finance.

(Senate Reports, Vol. I, Report No. 52, 69th Congress, 1st Session, page 36)

Court review—Venue.—Under the House bill, in cases of corporations, a decision of the board was to be reviewed, in case no return was made, by the circuit court of appeals for the circuit in which is located the office of the collector to whom the corporation should have made the return. Because of the indefiniteness of the law prescribing where a return should be filed, the committee amendment provides that in such case the decision may be reviewed by the Court of Appeals of the District of Columbia. A provision is also inserted permitting the commissioner and the taxpayer, whether individual or corporation, to stipulate the court to which the review will be taken, in order that any doubt as to the proper court may be removed by stipulation, whether before or after the petition is filed.

Extract from conference report.

(House Report, Vol. I, 69th Congress, 1st Session, Report No. 356, page 54)

Amendment No. 151: Under the House bill, in case of a corporation which had failed to make a return, a decision of the board would be reviewed by the circuit court of appeals for the circuit in which is located the office of the collector to whom the corporation should have made the return. The amendment provides that in such case the decision may be reviewed by the Court of Appeals of the District of Columbia, and also provides that the commissioner and the

taxpayer may, in any case, stipulate the court to which the review will be taken, in order to remove any doubt as to the proper court; and the House recedes.

Extract from original House bill (H. R. No. 1, 69th Cong., 1st sess., p. 235):

"SEC. 913. (a) Such decision may be reviewed—

"(1) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

"(2) In the case of a person (other than an individual), except as provided in paragraph (3), by the Circuit Court of Appeals for the circuit in which is located the office of the collector of internal revenue to whom such person made the return, and in case such person made no return, then for any circuit in which is located the office of a collector of internal revenue to whom such person should have made the return.

"(3) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

APPENDIX B

STATUTORY PROVISIONS RELATING TO JURISDICTION OF THE CIRCUIT COURTS OF APPEALS IN VARIOUS CLASSES OF CASES

Act of February 13, 1925, c. 229, 43 Stat. 936, (U. S. C. Title 28, § 225)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 128, 129, 237, 238, 239, and 240 of the Judicial Code as now existing be, and they are severally, amended and reenacted to read as follows:

SEC. 128. (a) The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 238.

"Second. In the United States district courts for Hawaii and for Porto Rico in all cases.

"Third. In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all cases, civil and criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000; in all other criminal cases where the

offense charged is punishable by imprisonment for a term exceeding one year or by death, and in all habeas corpus proceedings; and in the district court for the Canal Zone in the cases and mode prescribed in the Act approved September 21, 1922, amending prior laws relating to the Canal Zone.

"Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000, and in all habeas corpus proceedings.

"Fifth. In the United States Court for China, in all cases.

"(b) The circuit court of appeals shall also have appellate jurisdiction—

"First. To review the interlocutory orders or decrees of the district courts which are specified in section 129.

"Second. To review decisions of the district courts sustaining or overruling exceptions to awards in arbitration, as provided in section 8 of an Act entitled 'An Act providing for mediation, conciliation, and arbitration in controversies between certain employers and their employees', approved July 15, 1913.

"(c) The circuit courts of appeal shall also have an appellate and supervisory jurisdiction under sections 24 and 25 of the Bankruptcy Act of July 1, 1898, over all proceedings, controversies, and cases had or brought in the district courts under that Act or any of its amendments, and shall exercise the same in the manner prescribed in those sections; and the jurisdiction of the Circuit

Court of Appeals for the Ninth Circuit in this regard shall cover the courts of bankruptcy in Alaska and Hawaii, and that of the Circuit Court of Appeals for the First Circuit shall cover the court of bankruptcy in Porto Rico.

"(d) The review under this section shall be in the following circuit courts of appeal: The decisions of a district court of the United States within a State in the circuit court of appeals for the circuit embracing such State; those of the District Court of Alaska or any division thereof, the United States district court, and the Supreme Court of Hawaii, and the United States Court for China, in the Circuit Court of Appeals for the Ninth Circuit; those of the United States district court and the Supreme Court of Porto Rico in the Circuit Court of Appeals for the First Circuit; those of the District Court of the Virgin Islands in the Circuit Court of Appeals for the Third Circuit; and those of the District Court of the Canal Zone in the Circuit Court of Appeals for the Fifth Circuit.

"(e) The circuit courts of appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, as provided in section 5 of 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914; and orders of the Interstate Commerce Commission, the Federal Reserve Board, and the Federal Trade Commission, as provided in section 11 of 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914.

The Act of October 15, 1914, c. 323, 38 Stat. 730, 734-736 (U. S. C. Title 15, § 21)

SEC. 11. * * *

If such person fails or neglects to obey such order of the [Interstate Commerce] commission or [Federal Reserve] board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. * * *

* * * * * * *

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

The Act of Sept. 26, 1914, c. 311, 38 Stat. 717, 719-722 (U. S. C. Title 16, §§ 45, 46)

SEC. 5. * * *

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect,

the [Federal Trade] commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. * * *

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

The Act of Sept. 21, 1922, c. 369, 42 Stat. 998, 1002 (U. S. C. Title 7, § 9)

SEC. 6 (b).

* * * After the issuance of the order by the [Grain Futures Act] commission, as

aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States circuit court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the commission be set aside.

The Act of August 15, 1921, c. 64, 42 Stat. 159, 162–163 (U. S. C. Title 7, § 194)

SEC. 204.

(a) An order made [by the Secretary of Agriculture] under section 203 shall be final and conclusive unless within thirty days after service the packer appeals to the circuit court of appeals for the circuit in which he has his principal place of business, by filing with the clerk of such court a written petition praying that the Secretary's order be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such packer will pay the costs of the proceedings if the court so directs.

* * * * *

(h) The circuit court of appeals shall have exclusive jurisdiction to review, and to affirm, set aside, or modify, such orders of the Secretary, and the decree of such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon certiorari, as provided in section 240 of the Judicial Code, if such writ is duly applied for within sixty days after entry of the decree. The issue of such writ shall not operate as a stay of the decree of the circuit court of appeals, in so far as such decree op-

erates as an injunction, unless so ordered by the Supreme Court.

(i) For the purposes of this title the term "circuit court of appeals," in case the principal place of business of the packer is in the District of Columbia, means the Court of Appeals of the District of Columbia.

Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110

SEC. 1001. (a) The decision of the Board [of Tax Appeals] rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

(b) Such courts are authorized to adopt rules for the filing of such petition, the preparation of the record for review, and the conduct of proceedings upon such review and, until the adoption of such rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern.

* * * * * *

(U. S. C. App., Title 26, Sec. 1224.)

VENUE

SEC. 1002. Such decision may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit or the Court of Appeals of the District of Columbia, as stipulated in such agreement.

(U. S. C. Sup. IV, Title 26, Sec. 1225.)

JURISDICTION

SEC. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

(U. S. C. Sup. IV, Title 26, Sec. 1226.)

U. S. GOVERNMENT PRINTING OFFICE, 1924

SUPREME COURT OF THE UNITED STATES.

No. 549.—October Term, 1930.

Nash-Breyer Motor Company, formerly Troy Motor Sales Company, Petitioner,
vs.
David Burnet, Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 18, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner, a Delaware corporation having its principal office in California, filed federal income and profits tax returns for its fiscal years 1920 and 1921 with the Collector of Internal Revenue for its district in that state. Following a decision of the Board of Tax Appeals which upheld respondent's determination of tax deficiencies against petitioner for both years, 14 B. T. A. 546, petitioner and respondent entered into an agreement, stated to be pursuant to § 1002[1] of the Revenue Act of 1926, 44 Stat. 110, that the de-

[1]The Revenue Act of 1926 reads in part: "Sec. 1001. (a) The decision of the Board [of Tax Appeals] . . . may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia. . . .

Venue.

Sec. 1002. Such decision may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

cision of the Board might be reviewed by the Court of Appeals for the Second Circuit. The petition for review in that court recited that the parties had so agreed.

The Court of Appeals, of its own motion, dismissed the petition for lack of jurisdiction, 42 F. (2d) 192, on the authority of *Massachusetts Fire & Marine Ins. Co.* v. *Commissioner*, 42 F. (2d) 189, in which it had held that § 1002 (d) permits the parties to choose only between the Court of Appeals of the District of Columbia and the court of appeals for any circuit in which there is some ground for saying that venue might lie under subdivisions (a), (b) or (c). This Court granted certiorari, — U. S. —, January 5, 1931, the government acquiescing because of the importance of the question and the conflict of the decision below with one of the Court of Appeals for the First Circuit where, however, the point was neither discussed, *Simmons Co.* v. *Commissioner*, 33 F. (2d) 75, nor raised in the petition for certiorari, which was denied, 280 U. S. 588.[2]

Petitioner contends that under (d) the parties may stipulate for review in any circuit court of appeals. In view of the rule of the statutes that venue of the federal courts generally turns upon the geographical location of the parties and is never within their exclusive control, it would require plain language in this statute to support an unlimited choice. But the words of (d)—"the Circuit Court of Appeals for the circuit"—seem to refer, not to the court of appeals for any circuit, but to some particular circuit court of appeals previously described, necessarily that one wh[illegible]

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement.

JURISDICTION.

Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board. . . ."

[2]The Court of Appeals for the Second Circuit has twice assumed jurisdiction in cases like the present one, without discussion. Greylock Mills v. Commissioner, 31 F. (2d) 655; Fowler v. Commissioner, 42 F. (2d) 83[illegible]. In the latter case, certiorari was denied, but review was not sought on the question of venue. — U. S. —, January 12, 1931. The only other case discussing the question accords with the present. Spring Canyon Coal Co. v. Commissioner, 38 F. (2d) 764 (C. C. A. 8th).

could have entertained the petition, under (a), (b) or (c), in the absence of an agreement under (d). Only such a construction comports with the statement of the House Committee on Ways and Means, that the provisions now in § 1002 ". . . prevent undue burden upon those circuits embracing States in which a vast number of corporations are organized." House Reports, 69th Congress, 1st Session, Vol. 1, Report No. 1, p. 19. An unlimited choice might overburden a circuit court of appeals, whose docket was already overcrowded, with petitions for review with respect to which it could have had no venue under the other subdivisions of § 1002.

The Senate Committee on Finance, in proposing the addition of (d) to § 1002, stated that the purpose was to permit parties ". . . to stipulate the court to which the review will be taken, in order that any doubt as to the proper court may be removed . . ." Senate Reports, 69th Congress, 1st Session, Vol. 1, Report No. 52, p. 36. See also, to the same effect, the conference report in House Reports, *supra*, Report No. 356, p. 54. Whatever solution (d) may afford for the difficulties in those cases when doubts arise as to the proper circuit for review under (a), (b), or (c), here petitioner had its principal office in California and filed its return there, so that under (b) the venue could properly be laid only in the Court of Appeals for the Ninth Circuit. Hence the parties' right of choice by stipulation under (d) was restricted to that court or the Court of Appeals of the District of Columbia.

Section 1003 (a) confers jurisdiction to review decisions of the Board of Tax Appeals on circuit courts of appeals and the Court of Appeals of the District of Columbia. Section 1002 is entitled "Venue". Even if the effect of this distinction is to define venue but not to restrict the jurisdiction of the court below, it was not bound to exercise jurisdiction in the face of (d), which authorized the parties to control the venue only by stipulation conforming to its terms. See *Kansas City Ry. Co.* v. *United States*, 282 U. S. —, decided February 24, 1931. The restriction on the power of the parties to stipulate as to venue would be meaningless if they could waive it without the consent of the court.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.